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Supr. Ct.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1946

## No. 241

CONWAY C. CRAIG, BOB McCRACKEN AND TOM MULVANY, PETITIONERS,

*vs.*

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED JUNE 28, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1946

## No.

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CONWAY C. CRAIG, BOB McCRACKEN AND TOM MULVANEY, PETITIONERS,

*vs.*

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE CONWAY C. CRAIG, BOB MCCRACKEN, TOM MULVANY

No. 23232
No. 23233
No. 23234

[fol. 1] PETITION FOR WRIT OF HABEAS CORPUS—Filed August 3, 1945

To the Honorable Court of Criminal Appeals of Texas and the Judges thereof:

Comes now Conway C. Craig, a resident citizen of Nueces County, Texas, hereinafter called petitioner, and making this his petition for a writ of habeas corpus respectfully shows:

That petitioner is illegally restrained in his liberty and confined in the county jail of Nueces County, Texas, by John B. Harney, who is the sheriff of Nueces County, Texas; that such illegal restraint and confinement are by virtue of a certain commitment issued out of the County Court of Nueces County, Texas, upon an order or judgment of said County Court purporting to adjudge the petitioner guilty of contempt of court; as more particularly shown by true copies of said judgment and commitment annexed to this petition, marked Exhibits "A" and "B", respectively, and made a part hereof for all useful purposes.

Petitioner will also present in support of this petition, as soon as they are available, a copy of the record of said contempt proceedings, including the clerk's transcript, and the statement of facts as truly reflected by the court reporter's transcript of the evidence adduced at the hearing or trial of this petitioner which eventuated in the so-called judgment of contempt, including copies of all exhibits of every kind that were filed in connection with the pleadings or the evidence.

Wherefore petitioner prays that this Honorable Court or the Judge or Judges thereof to whom this petition is presented shall grant and issue forthwith a writ of habeas corpus directed to the said John B. Harney, Sheriff of Nueces County, Texas, commanding him to have this

petitioner before this Court forthwith or at a time to be fixed by the Judge to whom this writ shall be presented, to the end that a hearing may be had by this Court or a Judge or Judges thereof and that petitioner may be discharged from such illegal confinement and restraint. And [fol. 2] petitioner prays that, pending such hearing and final decision, petitioner be granted bail in a reasonable sum to be fixed by this Court or by the Judge to whom this petition shall be presented.

(Signed) Conway C. Craig, Petitioner; (Signed) by Ireland Graves, M. G. Eckhardt.

*Duly sworn to by Conway C. Craig. Jurat omitted in printing.*

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[fol. 3] EXHIBIT "A" TO PETITION

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3620

In the Matter of CONWAY C. CRAIG, BOB McCRACKEN and TOM MULVANY

This day this cause was regularly called for trial, the said cause coming out of an information verified and filed by an officer of this Court, the said information charging Conway C. Craig, Bob McCracken, and Tom Mulvany, all residents of the County of Nueces, with constructive criminal contempt of this Court, by virtue of having written, published and circulated, and caused to be written, published and circulated, in the City of Corpus Christi, where this Court was sitting, and in the County of Nueces, within the jurisdiction of this Court, certain newspaper reports and an editorial, having for their subject matter the proceedings in a cause then pending in this Court for trial and adjudication, the said reports and editorial being intended and calculated to reflect upon the integrity of this Court, and bring it into disrepute and prejudice and influence the Court in its rulings on the aforesaid cause, and that the publication and circulation were made with the intent and for the purpose of scandalizing the Court and were intended to influence or overawe its deliberations in such pending cause, and that they were made at a time and under circumstances calculated to affect the force of justice

in said proceeding, and were so calculated and intended to do; to which charges in said information contained, the respondents, Conway C. Craig, Bob McCracken and Tom Mulvany, after having been duly summonsed by writ of Scire Facias to appear before this Court and show cause if any they had, why a decree nici, adjudging them in contempt of Court and assessing the punishment of each of them at imprisonment in the County Jail of Nueces County for three days, unless they purged themselves of said contempt; should not be made final and absolute, duly [fol. 4] filed their written and verified responses denying the charges in said information contained, and the State appeared by her Special Assistant County Attorney ad litem, and the respondents, Conway C. Craig, Bob McCracken and Tom Mulvany appeared in person, their counsel also being present, and each of the parties announced ready for trial. Whereupon counsel for the respondents urged in behalf of each of them their demurrers to the information aforesaid, being the first and second sections of their several responses, and the Court, after having considered the said demurrers, overruled them, to which ruling of the Court counsel for the respondents, and each of them, then and there excepted. Whereupon counsel for all parties agreed and stipulated the certain facts material to the proper adjudication of this cause were undisputed, and the said agreement and stipulation having been reduced to writing and signed by counsel for both parties, it was approved by the Court and ordered filed as part of the record in this cause. Whereupon, the Court having heard the evidence and the observations of counsel, and having considered the information, the responses thereto, the stipulations of the parties, and all the evidence and the remarks of counsel made herein, now finds the following:

1. That from the 10th day of May, 1945, until the 9th day of June, 1945, there was pending before this Court for trial and adjudication, a certain cause numbered 3624 and titled B. M. Jackson, et al., vs. Joe L. Mayes, et al., and that this Court had jurisdiction of said cause.

2. That while said cause numbered 3624 was pending before this Court, there were written, published and circulated in the Corpus Christi Caller for May 26th, 1945, the Corpus Christi Times for May 26th, 1945, the Corpus

Christi Caller-Times for May 27th, 1945, the Corpus Christi Caller for May 28th, 1945, the Corpus Christi Times for May 28th, 1945, the Corpus Christi Caller for May 29th, 1945, the Corpus Christi Times for May 29th, 1945, the [fol. 5] Corpus Christi Caller for May 30th, 1945, the Corpus Christi Times for May 30th, 1945, and the Corpus Christi Caller for May 31st, 1945, the news reports and editorial from which the excerpts set forth in the information herein were taken, and that the Corpus Christi Caller is a daily morning newspaper published and generally circulated in the County of Nueces and within the jurisdiction of this Court, and that the Corpus Christi Times is an afternoon daily newspaper published and generally circulated in the County of Nueces and within the jurisdiction of this Court, and that the Corpus Christi Caller-Times is a Sunday morning newspaper published and generally circulated in the County of Nueces and within the jurisdiction of this Court, and that these newspapers are generally circulated and sold throughout the city of Corpus Christi and in and around the Courthouse for Nueces County, and were so circulated and sold throughout the pendency of said cause No. 3624, and that the said newspapers are caused to be published by the Caller-Times Publishing Company, a corporation, and that the said reports and editorial, considered in their entirety, by reason of inaccuracies contained therein, material matters omitted therefrom, emphasis on matters of evidence adduced at the trial of Cause No. 3624, and the inclusion in said articles and editorial of matters foreign to the record in said cause, were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in cause No. 3624, to coerce and compel a judgment contrary to the law and the evidence in said Cause No. 3624, and to block the administration of justice, and that the said news reports and editorial were intended so to do.

3. That the said respondent, Tom Mulvany is a news writer and news reporter for the three newspaper publications aforesaid, and in his capacity as such, wrote or caused to be written all of the news reports above referred to, and that the said Mulvany willfully and knowingly wrote or caused to be written the said newspaper articles in a manner calculated and intended to reflect upon the integrity

[fol. 6] of this Court to affect the course of justice and the rights of litigants in Cause No. 3624, to coerce and compel a judgment contrary to the law and the evidence in said cause No. 3624 and to block the administration of justice, and that the respondent, Mulvany could have and should have written or caused to be written the news reports aforesaid in a manner calculated not to have the effect hereinabove mentioned.

4. That the respondent, Bob McCracken is the Managing Editor of the three newspaper publications aforesaid, and the author of the editorial hereinabove referred to, and that as Managing Editor, he has and did have on the dates the publications aforesaid were made, supervision of the editorial departments of the three newspaper publications aforesaid, with the authority and the duty to exclude from publication in said three newspapers any newspaper article or editorial inimical to the best interests of the said newspapers, or of a nature calculated to block the administration of justice, in any cause pending in any Court in Nueces County, Texas. That the said editorial written by the respondent, McCracken, was of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in Cause No. 3624, to coerce and compel a judgment contrary to the law and the evidence in said Cause No. 3624 and to block the administration of justice, and that the said editorial was intended so to do; and that the said respondent, McCracken, in his capacity as Managing Editor, wholly failed to perform his duty and exclude from publication in the three newspapers aforesaid, the news reports hereinabove referred to, and that the said respondent, McCracken, permitted or directed and permitted the said news reports to be given undue prominence and display in the newspapers aforesaid.

5. That the respondent, Conway C. Craig, is and was on the dates of the publications hereinabove referred to, the President of the corporation, Caller-Times Publishing Com-[fols. 7-8] pany, and a stockholder therein, and publisher of the three newspaper publications hereinabove mentioned, and that in those capacities, the said respondent, Craig had the authority and the duty to exclude from publication in said three newspapers any newspaper article or editorial inimical to the best interests of the said newspapers or of

a nature calculated to block the administration of justice in any cause pending in any Court in Nueces County, Texas. That the said respondent, Craig was aware of the contents and natures of the articles and editorial published, and that he knowingly and willfully, in dereliction of his duty aforesaid, failed and refused to exclude the said news reports and editorial from the said publications, but on the contrary knowingly and willfully permitted them to be published and given undue prominence in the three newspapers aforesaid.

And the Court having considered the foregoing, is of the opinion that the respondents, Conway C. Craig, Bob McCracken and Tom Mulvany, and each of them, should be adjudged in contempt of this Court, and they are hereby so adjudged; and the punishment of each of them is hereby assessed at imprisonment in the County Jail for three days, and a capias will issue after this judgment has been spread upon the minutes of this Court, commanding the Sheriff of Nueces County to arrest the said respondents, Conway C. Craig, Bob McCracken and Tom Mulvany, and place them in jail in the County Jail of Nueces County, Texas, and there safely keep them imprisoned for the full period of three days from date hereof; and it is further ordered that the respondents, Conway C. Craig, Bob McCracken and Tom Mulvany pay all costs of proceedings had herein, for which costs let execution issue.

Signed, this the 3rd day of August, A. D. 1945.

Joe D. Browning, Judge of the County Court of Nueces County, Texas.

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[fol. 9] EXHIBIT "B" TO PETITION

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3626

In the Matter of CONWAY C. CRAIG, BOB McCRACKEN and TOM MULVANY

The State of Texas, to the Sheriff of Nueces County, Greeting:

Whereas, on the 3rd day of August, A. D. 1945, in the County Court of Nueces County, Texas, in a cause in the nature of a criminal proceeding, and numbered 3626, Con-

way C. Craig, Bob McCracken and Tom Mulvany, respondents, were adjudged in contempt of Court by reason of having written, published and circulated, and permitted to be written, published and circulated, certain news reports and an editorial intended and calculated to reflect upon the integrity of this Court, to affect the course of justice and the rights of litigants, to coerce and compel a judgment contrary to the law and the evidence, and to block the administration of justice in a cause pending in this Court at the time said publications were made, and the punishment of each of them was assessed at imprisonment in the County Jail of Nueces County for three full days from date hereof. You are therefore commanded to arrest the bodies of the said Conway C. Craig, Bob McCracken, and Tom Mulvany, and place them in the jail of said County, there to remain imprisoned for the said period of three full days from date hereof. Herein fail not, and due return make hereof according to law.

Witness my signature and seal of office, on this the 3rd day of August, A. D. 1945.

Mrs. Henry E. Gouger, Clerk of the County Court of Nueces County, Texas, by Claudine Toups, Deputy.
(Nueces County Crt. Seal.)

[fols. 10-11] Sheriff's Return

Came to hand the 3 day of Aug. A. D. 1945 at 12:10 o'clock A. M. executed on the 3 day of Aug. A. D. 1945, at 12:15 o'clock P. M. by arresting the within named Conway C. Craig, Bob McCracken, and Tom Mulvany at Corpus Christi, Texas, in Nueces County, Texas, and placing them in the County Jail of Nueces County, Texas.

John B. Harney, Sheriff, Nueces County, Texas, by John B. Harney.

Fees: 3:00.

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[fol. 12] In Court of Criminal Appeals of Texas

Petition for Writ of Habeas Corpus—Filed August 3, 1945

To the Honorable Court of Criminal Appeals of Texas and the Judges thereof:

Comes now Bob McCracken, a resident citizen of Nueces County, Texas, hereinafter called petitioner, and making

this his petition for a writ of habeas corpus respectfully shows:

That petitioner is illegally restrained in his liberty and confined in the county jail of Nueces County, Texas, by John B. Harney, who is the Sheriff of Nueces County, Texas; that such illegal restraint and confinement, are by virtue of a certain commitment issued out of the County Court of Nueces County, Texas, upon an order or judgment of said County Court purporting to adjudge the petitioner guilty of contempt of court; as more particularly shown by true copies of said judgment and commitment annexed to this petition, marked Exhibits "A" and "B", respectively, and made a part hereof for all useful purposes.

Petitioner will also present in support of this petition, as soon as they are available, a copy of the record of said contempt proceedings, including the clerk's transcript, and the statement of facts as truly reflected by the court reporter's transcript of the evidence adduced at the hearing or trial of this petitioner which eventuated in the so-called judgment of contempt, including copies of all exhibits of every kind that were filed in connection with the pleadings or the evidence.

Wherefore petitioner prays that this Honorable Court or the Judge or Judges thereof to whom this petition is presented shall grant and issue forthwith a writ of habeas corpus directed to the said John B. Harney, Sheriff of Nueces County, Texas, commanding him to have this petitioner before this Court forthwith or at a time to be fixed by the Judge to whom this writ shall be presented, to the end that a hearing may be had by this Court or a Judge or Judges thereof and that petitioner may be discharged from such illegal confinement and restraint. And petitioner prays that, pending such hearing and final decision, petitioner be granted bail in a reasonable sum [fol. 13] to be fixed by this Court or by the Judge to whom this petition shall be presented.

(Signed) Bob McCracken, Petitioner.

*Duly sworn to by Bob McCracken. Jurat omitted in printing.*

[fol. 23] IN COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF HABEAS CORPUS—Filed August 3, 1945

To the Honorable Court of Criminal Appeals of Texas and the Judges thereof:

Comes now Tom Mulvany, a resident citizen of Nueces County, Texas, hereinafter called petitioner, and making this his petition for a writ of habeas corpus respectfully shows:

Petitioner is illegally restrained in his liberty and confined in the county jail of Nueces County, Texas, by John B. Harney, who is the sheriff of Nueces County, Texas; that such illegal restraint and confinement are by virtue of a certain commitment issued out of the County Court of Nueces County, Texas, upon an order or judgment of said County Court purporting to adjudge the petitioner guilty of contempt of court; as more particularly shown by true copies of said judgment and commitment annexed to this petition, marked Exhibits "A" and "B", respectively, and made a part hereof for all useful purposes.

Petitioner will also present in support of this petition, as soon as they are available, a copy of the record of said contempt proceedings, including the clerk's transcript, and the statement of facts as truly reflected by the court reporter's transcript of the evidence adduced at the hearing or trial of this petitioner which eventuated in the so-called judgment of contempt, including copies of all exhibits of every kind that were filed in connection with the pleadings or the evidence.

Wherefore petitioner prays that this Honorable Court or the Judge or Judges thereof to whom this petition is presented shall grant and issue forthwith a writ of habeas corpus directed to the said John B. Harney, Sheriff of Nueces County, Texas, commanding him to have this petitioner before this Court forthwith or at a time to be fixed by the Judge to whom this writ shall be presented, to the end that a hearing may be had by this Court or a Judge or Judges thereof and that petitioner may be discharged from such illegal confinement and restraint. And petitioner prays that, pending such hearing and final decision, peti-

[fols. 24-33] tioner be granted bail in a reasonable sum to

be fixed by this Court or by the Judge to whom this petition shall be presented.

(Signed) Tom Mulvany, Petitioner. By (Signed) Ireland Graves. (Signed) M. G. Eckhardt, His Attorneys.

*Duly sworn to by Tom Mulvany; jurat omitted in printing.*

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[fol. 34] IN COURT OF CRIMINAL APPEALS OF TEXAS

Cause 23232. Exparte Conway C. Craig

ORDER GRANTING WRIT OF HABEAS CORPUS, ETC.

In the above numbered and styled cause the application of Conway C. Craig for a writ of habeas corpus is granted and ordered filed. Said cause is made returnable to the next regular term of the Court of Criminal Appeals of Texas. John B. Harney, Sheriff of Nueces County, Texas, is commanded to release the said Conway C. Craig upon his execution of a good and sufficient bond in the sum of $250.00 Dollars, with good and sufficient surety, approved by the said sheriff of Nueces County, Texas, conditioned that the said Conway C. Craig will appear before the Court of Criminal Appeals at the next regular term of said Court, on October 10th, 1945, and there to remain from day to day and from term to term, and to abide by the orders and judgment of the Court of Criminal Appeals.

Done in vacation this 3d day of August, 1945.

(Signed) F. L. Hawkins, Presiding Judge, Court of Criminal Appeals of Texas.

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[fol. 35] IN COURT OF CRIMINAL APPEALS OF TEXAS

Cause #23233 Exparte Bob McCracken

ORDER GRANTING WRIT OF HABEAS CORPUS, ETC.

In the above numbered and styled cause the application of Bob McCracken for a writ of habeas corpus is granted and ordered filed. Said cause is made returnable to the next regular term of the Court of Criminal Appeals of

Texas. John B. Harney, Sheriff of Nueces County, Texas, is commanded to release the said Bob McCracken upon his execution of a good and sufficient bond in the sum of $250.00 Dollars, with good and sufficient surety, approved by the said sheriff of Nueces County, Texas, conditioned that the said Bob McCracken will appear before the Court of Criminal Appeals at the next regular term of said Court, on October 10th, 1945, and there to remain from day to day and from term to term, and to abide by the orders and judgment of the Court of Criminal Appeals.

Done in vacation this 3d day of August, 1945.

(Signed) F. L. Hawkins, Presiding Judge, Court of Criminal Appeals of Texas.

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[fols. 36-37] IN COURT OF CRIMINAL APPEALS OF TEXAS

Cause #23234 Exparte Tom Mulvany

ORDER GRANTING WRIT OF HABEAS CORPUS, ETC.

In the above numbered and styled cause the application of Tom Mulvaney for a writ of habeas corpus is granted and ordered filed. Said cause is made returnable to the next regular term of the Court of Criminal Appeals of Texas. John B. Harney, Sheriff of Nueces County, Texas, is commanded to release the said Tom Mulvaney upon his execution of a good and sufficient bond in the sum of $250.00 Dollars with good and sufficient surety, approved by the said sheriff of Nueces County, Texas, conditioned that the said Tom Mulvaney will appear before the Court of Criminal Appeals at the next regular term of said Court, on October 10th, 1945, and there to remain from day to day and from term to term, and to abide by the orders and judgment of the Court of Criminal Appeals.

Done in vacation this 3d day of August, 1945.

(Signed) F. L. Hawkins, Presiding Judge, Court of Criminal Appeals of Texas.

[fol. 38] IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3626

COMPLAINT—Filed June 4, 1945

To the Honorable Judge of said Court:

Now comes Newt Wright, and respectfully shows the court the following: That while this honorable court was in regular session, having been called on the 21st day of May, 1945, there was pending before the said court for judicial determination cause No. 3624, wherein B. M. Jackson, Franklin Flato, Frederick Flato and Harry G. Heaney were plaintiffs, and Joe L. Mayes and F. F. Burchard were defendants; that said cause was on appeal to this honorable court by the defendants from a judgment for the plaintiffs in Justice Court for Place 2, Precinct 1, of this county, and came on for trial de novo on the 25th day of May, 1945; that the court did, after having impaneled a jury and heard the evidence on the said cause and on a motion of the plaintiffs, instruct the jury to return a verdict for the plaintiff and against the defendant; and the jury having on the 27th day of May, 1945, pursuant to such instruction returned the said verdict, the court rendered judgment for the plaintiff, to which judgment the defendants did then and there in open court except; that on the 29th day of May, 1945, the defendants timely filed their motion for a new trial in said cause, and that said motion was set for hearing at 9 A. M. on the 6th day of June, 1945, and that said cause, at the time the hereinafter complained of acts were done and this affidavit is made, is still pending before this court.

Affiant would further show that he is interested in said cause by virtue of being an officer of the said court. Affiant would further show the court that on the dates hereinafter shown Conway C. Craig, publisher of the Corpus Christi Caller, the Corpus Christi Times, and the Corpus Christi Caller-Times, the first two named being daily newspapers of general circulation in the City of Corpus Christi and County of Nueces where the cause aforesaid is now pending, and the Corpus Christi Caller-Times being a Sunday newspaper of [fol. 39] general circulation in the City and County aforesaid, together with Bob McCracken, an editorial writer, and Tom Malvaney, a news writer, of the newspaper aforesaid,

did knowingly and wilfully, without justification or excuse, when they could and should have done otherwise, write, publish and circulate, the hereinafter purported factual news stories and editorial comments.

On the 26th day of May, 1945, in the Corpus Christi Caller, there was published a purported news story which included the statement "that Burchard further claimed that although he had not known of the option clause, when he learned of it he immediately proffered a check for $275.00 rental;" that on the 27th day of May, 1945, in the Corpus Christi Caller-Times, there was written, published and circulated a purported news story of proceedings had that included the following statement: "At 7 P. M. Browning, without listening to argument from counsel for either side on a plaintiffs' motion presented by Dudley Tarlton for Jackson, and without giving the six-man jury opportunity to weigh the evidence, instructed the jury to find against Mayes. W. M. Lewright, Mayes' attorney, protested that the court's arbitrary action had ruled that Tarlton's "one page motion did not need supporting argument and citation of authorities," that on the 28th day of May, 1945, there was written, published and circulated in the Corpus Christi Caller an article which contained the following language:

"Browning accepted Tarlton's one-page motion, and without permitting argument or citation of authorities to support the motion, ruled that it be granted. The effect of this ruling was that Browning took the matter from the jury."

That the said article also included the following speech made by Walter Lewright, of counsel for the defendants:

"However, I now advise you that under the law, Judge Browning has the right to compel you, even against the dictates of your conscience, to sign the verdict he has ordered.

"As a matter of fact, it is probable that he has the [fol. 40] power to put you in jail until such time as you do sign it, and I rather imagine, from what has heretofore taken place in this trial, that unless you do sign the verdict, he will cause you to be put in jail.

"As I and my clients feel that you have done all in your power to register your protest and revulsion of feeling at the affect of this decision reached by Judge

Browning; as you are helpless to do anything further; and as making you suffer by remaining locked up will not do us a bit of good, I suggest that you sign the verdict and return to your homes with a clear conscience of having done all that you could to protect the rights of the man whom I feel, and evidently you feel, has been done a gross injustice.

"While we have no appeal from the court's decision in this case, we do have the right again to appeal to his conscience by presenting a motion for new trial in this action—and which motion we will file and argue strenuously with the hope that in the meantime he will see the error committed and will rectify the same.

"There cannot be any doubt but that the action of you men in registering your protest against this decision, as you have done, will affect him. At least, I can only hope that it will. I sincerely thank you."

That on the 30th day of May, 1945, in an article written by the aforesaid Bob McCracken, and published and circulated in the Corpus Christi Caller under the editorial masthead, The Crow's Nest, there was contained the following language:

"Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such going on, especially when a man in the service of his country seems to be getting a raw deal."

And further:

[fol. 41] "Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a chance to argue against it.

That was the travesty on justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high-handed procedure, in instructing a jury. It's no wonder that the jury balked and public opinion is outraged.

The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where the fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices have been run into the ground, and in most instances, a competent layman would be better qualified, but the county judge's office is an exception. He should be a competent attorney as well as a competent businessman.

It's the tragedy in a case of this sort that the court where the controversial decision was handed down is the court of last resort. It's too bad that appeal can't be made to a district court and heard by a judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly."

And further:

"There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated."

That on the same 30th day of May, 1945, in the same issue of the Corpus Christi Caller, there appeared what purported to be a report of action taken by the Sailors and Soldiers Advisory Council of Corpus Christi, the said [fol. 42] action reported to have been the passage of a resolution "labeling County Judge Joe D. Browning's order for a directed verdict against Mayes a 'gross miscarriage of justice' ". The said article further states that

"The council's resolution called on Browning to grant Mayes a new trial on the grounds that he had committed an error in instructing the jury to find for the plaintiff. The petition asked that Browning, upon granting the new trial, should disqualify himself to further sit as Judge in the case, and should permit the case to be retried before another judge and jury."

And further:

"The trial reached a climax Saturday night when Browning, on motion of Dudley Tarlton, Jackson's counsel, and without argument or citation of author-

ites, instructed the six-man County Court jury to find for Jackson. The jury twice refused, both times bringing in verdicts in favor of Mayes and against Jackson. Browning had the jury confined to the court house jury room all Saturday night. Sunday morning, when the court convened, the jury reported that it still had not signed the verdict in favor of Jackson. Browning announced that he would lock the jury up until Monday morning. However, Walter M. Lewright advised the jurymen that they should not continue to 'suffer' any longer, and should sign the verdict, since Browning had a legal right to force them to do so. The jury signed the verdict, but appended a statement asserting that they did so under pressure."

That on the 31st day of May, 1945, there was written, published and circulated by the persons aforesaid in Corpus Christi Caller a purported news story, which said,

"Three local groups reported to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy Cafe ouster suit.

[fol. 43] "One petition is reportedly being drawn by a parents teachers' group, another by a service mothers' group, and the third is being drawn for independent circulation among parents of men in service.

The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi Soldier's and Sailors Advisory Council Tuesday night. This petition called on Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under another judge and jury. Action on the petitions is expected shortly.

The council's petition, drawn up by five veteran's organizations with a membership of more than 1,000 followed by a few hours the filing of a motion for a new trial by Walter M. Lewright and LeGrand Woods, Mayes' counsels."

The article also contained the following language:

"It came to a climax Sunday when Browning Saturday night accepted without argument or citation of

authority a motion by Dudley Tarlton, Jackson's lawyer, for an instructed verdict."

The same article said further:

> "The jury was kept Saturday night in the courthouse. Sunday morning, following a threat by Browing to keep the jury together until they did sign, the jurymen signed the verdict, appending a statement that they did so against the dictates of their conscience."

Affiant would further state that the articles aforesaid, in their entirety and considered together, were calculated and intended to falsely present to the public the nature of the proceedings had, and to compel a different result on the hearing of a new trial; that the said articles falsely stated that Mayes was an ex-insurance man, when in truth and in fact his principal business during the time the said cause was pending was and is the insurance business. [fol. 44] The said articles, and all of them, failed to state the terms of the contract declared on by plaintiffs; they failed to state that the check which the defendant Burchard testified he had proffered was tendered seven days late, and that the said check was post dated 30 days from the date tendered, and could not, in consequence, be considered a legal tender of rent money. The said articles omitted to state that the arrangements under which the premises were operated had been in existence for some months before the defendant Mayes was inducted into the Army. The said articles failed to state the legal grounds upon which plaintiff's motion for an instructed verdict was urged and granted, but referred to it in a derogatory manner, in quotations, as a "one-page motion." That the articles omitted much material evidence that would have enabled the public generally to form a fair estimate of the real nature of the controversy; that the articles failed and omitted to name the principal plaintiffs, who are highly respected business and professional men of Corpus Christi, Texas; that the articles needlessly repeated and emphasized the fact that the defendant Mayes was in the armed service; that the articles repeated, reiterated and over-emphasized the court's insistance that the verdict be returned in accordance with its instructions; that the articles needlessly repeated, reiterated and over-

emphasized the fact that no argument was heard on plaintiffs' motion, and gave no prominence to the fact that defendant's motion for an instructed verdict was argued by defendant's counsel for ninety minutes, and that *rul* on that motion was held in abeyance until all the evidence was in.

That the articles failed to state that the jury had no right to conclude what the law might be upon the proof of any given set of facts, but that they were duty bound to receive the law from the court; that the articles failed and omitted to state that the court was under no duty to hear arguments or the citation of authorities from either party, and that remarks of counsel for the defendants were set forth verbatim and given prominence while remarks of [fol. 45] counsel for the plaintiffs were omitted or given no prominence.

Affiant would further show the court that these articles, in their entirety and standing alone and together, were wilfully and knowingly written, published and circulated by the persons aforesaid for the purpose of presenting to the reading public by means of false statements, omissions, distortions and over-emphasis; that in its essence the action was on brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen, unable because of his service to his country, to defend himself, of his rights in and to valuable property, and that counsel for plaintiffs and the court, aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court was in fact corrupt, improper and unlawful.

Affiant would further show the court that the purpose of this representation to the citizenry of the City of Corpus Christi and County of Nueces was intended and calculated to reflect upon the integrity of the court, and bring it into disrepute and prejudice and influence the court in its ruling on the aforesaid motion for a new trial, and that the said publications and circulations were made for the purpose and with the intent of scandalizing the court, and intended to influence or overawe its deliverations in said pending cause, and were made at a time and under circumstances calculated to affect the force of justice in said

proceedings, and were so calculated to do and were intended for that purpose.

Affiant would further show the court that the said Conway C. Craig, Bob McCracken and Tom Mulvaney, are by reason of the said writing, publication and circulation, guilty of contempt of this court.

Newt Wright.

[fol. 46] *Duly sworn to by Newt Wright. Jurat omitted in printing.*

[File endorsement omitted.]

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[fol. 47] IN THE COUNTY COURT OF NEUCES COUNTY

In the Matter of CONWAY C. CRAIG, BOB MCCRACKEN AND TOM MULVANEY

JUDGMENT—Filed June 4, 1945

This the 4th day of June, 1945, it appearing to the satisfaction of the court that from the affidavit of Newt Wright, an officer of this court, that Conway C. Craig, Bob McCracken and Tom Mulvaney, who reside in Neuces County, Texas; are guilty of contempt of this court in the following respects:

That while this honorable court was in regular session, having been called on the 21st day of May, 1945, there was pending before the said court for judicial determination cause No. 3624, wherein B. M. Jackson, Franklin Flato, Frederick Flato and Harry G. Heaney were plaintiffs, and Joe L. Mayes, and F. F. Burchard were defendants; that said cause was on appeal to this honorable court by the defendants from a judgment for the plaintiffs in Justice Court for Place 2, Precinct 1, of this county, and came on for trial de novo on the 25th day of May, 1945; and that the court did, after having impaneled a jury and heard the evidence on the said cause and on a motion of the plaintiffs, instruct the jury to return a verdict for the plaintiffs and against the defendants; and the jury having on the 27th day of May, 1945, pursuant to such instruction, returned the said verdict, the court rendered judgment for the plaintiffs, to which judgment the defendants did then

and there in open court except; that on the 29th day of May, 1945, the defendants timely filed their motion for a new trial in said cause, and that said motion was set for hearing at 9 AM on the 6th day of June, 1945, and that said cause, at the time the hereinafter complained of acts were done and this affidavit is made, is still pending before this court.

Affiant would further show that he is interested in said cause by virtue of being an officer of the said court. Affiant would further show the court that on the dates hereinafter shown Conway C. Craig, publisher of the Corpus Christi [fol. 48] Caller, the Corpus Christi Times and the Corpus Christi Caller-Times, the first two named being daily newspapers of general circulation in the City of Corpus Christi and County of Nueces where the cause aforesaid is now pending; and the Corpus Christi-Caller-Times being a Sunday newspaper of general circulation in the City and County aforesaid, together with Bob McCracken an editorial writer, and Tom Mulvaney, a news writer, of the newspapers aforesaid, did knowingly and wilfully, without justification or excuse, when they could and should have done otherwise, write, publish and circulate, the hereinafter purported factual news stories and editorial comments.

On the 26th day of May, 1945, in the Corpus Christi Caller, there was published a purported news story which included the statement

> "that Burchard further claimed that although he had not known of the option clause, when he learned of it he immediately proffered a check for $275.00 rental;"

that on the 27th day of May, 1945, in the Corpus Christi Caller-Times, there was written, published and circulated a purported news story of proceedings had that included the following statement:

> "At 7 PM Browning, without listening to argument from counsel for either side on the plaintiffs' motion presented by Dudley Tarlton for Jackson, and without giving the six-man jury opportunity to weight the evidence, instructed the jury to find against Mayes. W. M. Lewright, Mayes' attorney, protested that the court's arbitrary action had ruled that Tarlton's 'one-page motion' did not need supporting argument and citation of authorities;"

That on the 28th day of May, 1945, there was written, published and circulated in the Corpus Christi Caller an article which contained the following language:

> "Browning accepted Tarlton's one-page motion, and without permitting argument or citation of authorities to support the motion, ruled that it be granted. [fol. 49] The effect of this ruling was that Browning took the matter from the jury."

That said article also included the following speech made by Walter Lewright, of counsel for the defendants:

> "However, I now advise you that under the Law, Judge Browning has the right to compel you, even against the dictates of your conscience, to sign the verdict he has ordered. As a matter of fact, it is probable that he has the power to put you in jail until such time as you do sign it, and I rather imagine, from what has heretofore taken place in this trial, that unless you do sign the verdict, he will cause you to be put in jail. As I and my clients feel that you have done all in your power to register your protest and revulsion of feeling at the effect of this decision reached by Judge Browning; as you are helpless to do anything further; and as making you suffer by remaining locked up will not do us a bit of good, I suggest that you sign the verdict and return to your homes with a clear conscience of having done all that you could to protect the right of the man whom I feel, and evidently you feel, has been done a gross injustice."
>
> While we have no appeal from the court's decision in this case, we do have the right again to appeal to his conscience by presenting a motion for new trial in this action—and which motion we will file and argue strenuously with the hope that in the meantime he will see the error committed and will rectify the same. There cannot be any doubt but that the action of you men in registering your protest against this decision, as you have done, will affect him. At least, I can only hope that it will. I sincerely thank you."

That on the 30th day of May, 1945, in an article written by the aforesaid Bob McCracken, and published and circu-

lated in the Corpus Christi Caller under the editorial masthead The Crow's Nest, there was contained the following language:

> "Browning's behavior and attitude has brought [fol. 50] down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on, especially when a man in the service of his country seems to be getting a raw deal."

And further:

> "Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a chance to argue against it.
>
> That was the travesty on justice, the judge's refusal to hear both side. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's now wonder that the jury balked and public opinion is outraged.
>
> The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where the fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances, a competent layman would be better qualified, but the county judge's office is an exception. He should be a competent attorney as well as a competent businessman.
>
> It's a tragedy in a case of this sort that the court where the controversial decision was handed down is the court of last resort. It's too bad that appeal can't be made to a district court and heard by a judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel, and make his decisions accordingly."

And further:

"There is no way of knowing whether justice was done, because the first rule of justice, giving both sides [fol. 51] an opportunity to be heard, was repudiated."

That on the same 30th day of May, 1945, in the same issue of the Corpus Christi Caller, there appeared what purported to be a report of action taken by the Sailor's and Soldier's Advisory Council of Corpus Christi, the said action reported to have been the passage of a resolution

"labeling County Judge Joe D. Browning's order for a directed verdict against Mayes a 'gross miscarriage of justice.'"

The said article further states that

"The council's resolution called on Browning to grant Mayes a new trial on the grounds that he had committed an error in instructing the jury to find for the plaintiff. The petition asked that Browning, upon granting the new trial, should disqualify himself to further sit as judge in the case, and should permit the case to be re-tried before another judge and jury."

And further:

"The trial reached a climax Saturday night when Browning, on motion of Dudley Tarlton, Jackson's counsel, and without argument or citation of authorities, instructed the six-man County Court jury to find for Jackson. The jury twice refused, both times bringing in verdicts in favor of Mayes and against Jackson. Browning had the jury confined to the courthouse jury room all Saturday night. Sunday morning when the court convened, the jury reported that it still had not signed the verdict in favor of Jackson. Browning announced that he would lock the jury up until Monday morning. However, Walter M. Lewright, advised the jurymen, that they should not continue to 'suffer' any longer, and should sign the verdict, since Browning had a legal right to force them to do so. The jury signed the verdict, but appended a statement asserting that they did so under pressure."

That on the 31st day of May, 1945, there was written, published and circulated by the persons aforesaid in the

[fol. 52] Corpus Christi Caller a purported news story, which said:

> "Three local groups were reported to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy Cafe suit.
>
> One petition is reportedly being drawn by a parents and teachers' group, another by a service mothers' group, and the third is being drawn for independent circulation among parents of men in service.
>
> The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi Soldier's and Sailor's Advisory Council Tuesday night. This petition called on Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under another judge and jury.
>
> Action on the petitions is expected shortly.
>
> The council's petition, drawn by five veterans' organizations with a membership of more than 1,000, followed by a few hours the filing of a motion for new trial by Walter M. Lewright and LeGrand Woods, Mayes' counsels."

The article also contained the following language:

> "It came to a climax Sunday when Browning Saturday night accepted without argument or citation of authority a motion by Dudley Tarlton, Jackson's lawyer, for an instructed verdict."

The same article said further:

> "The jury was kept Saturday night in the courthouse. Sunday morning, following a threat by Browning to keep the jury together until the did sign, the jurymen signed the verdict, appending a statement that they did so against the dictates of their conscience."

Affiant would further state that the articles aforesaid, in their entirety and considered together, were calculated and intended to falsely present to the public the nature of the proceedings had, and to compel a different result on the hearing of a new trial; that the said articles falsely [fol. 53] stated that Mayes was an ex-insurance man, when in truth and in fact his principal business during the time

the said cause was pending, was and is the insurance business.

The said articles, and all of them, failed to state the terms of the contract declared on by plaintiffs; they failed to state that the check which the defendant Burchard testified he had proffered was tendered seven days late, and that the said check was postdated 30 days from the date tendered, and could not, in consequence, be considered a legal tender of rent money.

The said articles omitted to state that the arrangements under which the premises were operated had been in existence for some months before the defendant Mayes was inducted into the Army. The said articles failed to state the legal grounds upon which plaintiffs' motion for an instructed verdict was urged and granted, but referred to it in a derogatory manner, in quotations, as a "one-page motion." That the articles omitted much material evidence that would have enabled the public generally to form a fair estimate of the real nature of the controversy; that the articles failed and omitted the names of the principal plaintiffs, who are highly respected business and professional men of Corpus Christi, Texas; that the articles needlessly repeated and emphasized the fact that the defendant Mayes was in the armed service; that the articles, repeated, reiterated and over-emphasized the court's insistence that the verdict be returned in accordance with its instructions; that the articles *needless* repeated, reiterated and over-emphasized the fact that no argument was heard on plaintiffs' motion, and gave no prominence to the fact that defendant's motion for an instructed verdict was argued by defendant's counsel for ninety minutes, and that ruling on that motion was held in abeyance until all the evidence was in.

That the articles failed to state that the jury had no right to conclude what the law might be upon the proof of any given set of facts, but that they were duty bound to receive the law from the court; that the articles failed to [fol. 54] state that the court was under no duty to hear arguments or the citation of authorities from either party, and that remarks of counsel for the defendants were set forth verbatim and given prominence, while remarks of counsel for the plaintiffs were omitted or given no prominence.

Affiant would further show the court that these articles,

in their entirety and standing alone and together, were wilfully and knowingly written, published and circulated by the persons aforesaid for the purpose of presenting to the reading public be means of false statements, omissions, distortions and over-emphasis, that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen, unable because of his service to his country, to defend himself, of his rights in and to valuable property, and that counsel for plaintiffs and the court aided and abetted the corrupt parties aforesaid in the furtherence and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful.

Affiant would further show the court that the purpose of this representation to the citizenry of the City of Corpus Christi and County of Nueces was intended and calculated to reflect upon the integrity of the court, and bring it into disrepute and prejudice and influence the court in its ruling on the aforesaid motion for a new trial, and that the said publications and circulations were made for the purpose and with the intent of scandalizing the court, and intended to influence or overawe its deliverations in said pending cause, and were made at a time and under circumstances calculated to affect the force of justice in said proceedings, and were so calculated to do and were intended for that purpose.

Affiant would further show the court that the said Conway C. Craig, Bob McCracken and Tom Mulvaney, are, by reason of the said writing, publication and circulation, [fols. 55-82] guilty of contempt of this court.

It is, therefore, ordered, adjudged and decreed by the court that the said Conway C. Craig, Bob McCracken and Tom Mulvaney be and they are hereby held guilty of contempt as aforesaid, and that they be punished by confinement in the County Jail of Nueces County, Texas, for three days, unless they purge themselves thereof.

It is further ordered that the said Conway C. Craig, Bob McCracken and Tom Mulvaney be cited by scire facias to appear before said court at the Courthouse in Corpus Christi, Texas, on the 8th day of June, 1945, at 9:30 A. M., then and there to show cause why this judgment should

not be made final and absolute against them, and that a certified copy of such affidavit and of this judgment be served upon them, together with a copy of such scire facias.

Joe D. Browning, Judge of the County Court of Nueces County, Texas.

[File endorsement omitted.]

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[fol. 83] IN THE COUNTY COURT OF NUECES COUNTY

No. 3626

In the matter of CONWAY C. CRAIG, BOB MCCRACKEN and TOM MULVANEY

ANSWER OF RESPONDENT, CONWAY C. CRAIG—FILED JULY 24, 1945.

To the writ of scire facias to show cause why there should not be made final and absolute the decree nisi ordering, adjudging and decreeing that this Respondent, together with Respondents Bob McCraken and Tom Mulvaney, be adjudged guilty of contempt of Court and punishing them, and each of them, "by confinement in the County Jail of Nueces County, Texas, for three days, unless they purge themselves thereof," the Respondent, Conway C. Craig, answers as follows:

First

He says that the decree nisi is void upon its face. The information or affidavit upon which the decree is based states no grounds upon which to found a valid order or judgment of contempt against Respondent. Any judgment of contempt so based would deprive Respondent of his liberty and freedom of speech and of the press without due process of law, guaranteed to him by the 14th Amendment to the Constitution of the United States, and by Article 1, Section 8 of the Constitution of the State of Texas.

Second

He says that all those portions of the information and decree charging that the publications or portions of same

were intended and calculated to scandalize and reflect upon the integrity of the Court and bring it into disrepute and prejudice, states no valid ground for a judgment of contempt and should, therefore, be stricken.

Third

Answering further, if required to do so, but without in any manner waiving the foregoing, this Respondent would show the following:

[fol. 84] The Status and Position Occupied in General by the Several Respondents with Respect to Newspaper Publications of the Caller-Times Publishing Company:

A. The Caller-Times Publishing Company is a corporation, duly incorporated under the laws of this State, having its principal offices and place of business in t City of Corpus Christi, County of Nueces, State of Texas. It owns and causes to be published under due and proper permit three publications, namely: (a) The Corpus Christi Caller, a morning newspaper; (b) The Corpus Christi Times, an afternoon newspaper, both of such publications being daily newspapers of general circulation in the City of Corpus Christi and County of Nueces; and (c) The Corpus Christi Caller-Times, being a Sunday newspaper of general circulation in the same City and County last mentioned.

B. Respondent, Conway C. Craig, is the Publisher of The Corpus Christi Caller, The Corpus Christi Times, and The Corpus Christi Caller-Times, and, as such, has general supervision and control over, and directs the business affairs of the corporation and its several newspaper publications. He does not edit or write editorials, newspaper stories or articles in either of the newspaper publications, nor does he, in his capacity as Publisher, supervise or direct the writing of editorials, newspaper stories or columns printed in either of the three newspaper publications here involved. Respondent Craig was acting in the capacity and status of Publisher of the several newspaper publications during all the time and occasions mentioned in the decree nisi and the accompanying affidavit.

C. Respondent, Bob McCracken, is Managing Editor of the several newspaper publications, consisting of The Corpus Christi Caller, The Corpus Christi Times, and The

Corpus Christi Caller-Times. He writes the column called the "Crow's Nest" in the Corpus Christi Caller and The Corpus Christi Caller-Times. This column called the "Crow's Nest," though written for such publications by Respondent McCracken, nevertheless represents the independent views, opinions and conceptions of Respondent McCracken, and does not in any case, necessarily reflect the [fol. 85] policy of the several newspaper publication-, or of the editors, publisher and newswriters thereof. At the end of the "Crow's Nest" columns, this notation, in substance and effect, appears at the foot of each publication of the column:

> "This column is written for the Caller (or the Caller-Times) by Bob McCracken. Opinions expressed are those of the writer and do not necessarily reflect the policy of this newspaper."

Respondent McCracken also writes other editorials in the several newspaper publications for which he is Managing Editor. Among other things, he also has general supervision of all newswritings and stories prepared and written by the various reporters for the three newspaper publications for which he is Managing Editor. During all of the times and occasions referred to in the decree nisi and the accompanying affidavit, he was acting in the above described capacity and status as Managing Editor of the several newspaper publications above mentioned.

D. Respondent, Tom Mulvaney, is a news writer and news reporter for each of the three newspaper publications. As such, he writes news reports and factual news narratives, including especially the news reports in connection with the trial and disposition of cases in all the State Courts holding terms in Corpus Christi, Texas, and also the United States District Court for the Southern District of Texas, when sitting in Corpus Christi, Texas. During all of the times and occasions referred to in the decree nisi, as well as in the accompanying affidavit, he was acting in the above described capacity and status as news writer in respect to the newspaper publications last mentioned.

The Newspaper Writings And The Editorial Set Forth In The Decree Nisi As Being The Basis For The Contempt Adjudged To Have Been Committed By Respondents.

E. As a part of this Respondent's Answer, there is filed herewith the following Exhibits which, though filed [fol. 86] under separate cover, are nevertheless made as much a part of this pleading as if completely copied herein:

(a) *Exhibit C-26*, being a true and correct photostatic copy of the first page of Section B of the original publication of the Corpus Christi Caller of Saturday, May 26, 1945.

(b) *Exhibit T-26*, being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Times of Saturday, May 26, 1945.

(c) *Exhibit C-T-27*, being a true and correct photostatic copy of the first and eighth pages of the original publication of the Corpus Christi Caller-Times of Sunday, May 27th, 1945.

(d) *Exhibit C-28*, being a true and correct photostatic copy of the first and third pages of the original publication of the Corpus Christi Caller of Monday, May 28th, 1946.

(e) *Exhibit T-28*, being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Times of Monday, May 28th 1945.

(f) *Exhibit C-29*, being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Caller of Tuesday, May 29th, 1945.

(g) *Exhibit T-29*, being a true and correct photostatic copy of the first and eighth pages of the original publication of the Corpus Christi Times of Tuesday, May 29, 1945.

(h) *Exhibit C-30*, being a true and correct photostatic copy of the first and eighth pages of the original publication of the Corpus Christi Caller of Wednesday, May 30th, 1945.

(i) *Exhibit T-30,* being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Times of Wednesday, May 30th, 1945.

(j) *Exhibit C-31,* being a true and correct photostatic copy of the first page of the issue of the Corpus Christi Caller of Thursday, May 31st, 1945.

[fol. 87] (k) *Exhibit T-31;* being a true and correct photostatic copy of the first and tenth pages of the issue of the Corpus Christi Times of Thursday, May 31st, 1945.

The decree nisi and the accompanying information contain only portions or partial excerpts of the column called the "Crow's Nest," the news-writings and articles published in the several daily issues of the Corpus Christi Caller, the Corpus Christi Caller-Times and the Corpus Christi Times during the period commencing May 26th, 1945, to May 31st, 1945, both inclusive. The foregoing Exhibits contain the full, complete and correct content of such columns, news-writings and articles, and they are made a part of this Answer so that the full meaning and purport of the column and articles may be obtained, not from portions or excerpts thereof, but from the full and complete context of the column, news stories and articles.

The column published in the Corpus Christi Caller, of the issue of May 30th, 1945, is likewise set forth in its entirety in Exhibit C-30 so that its meaning, intendments and effect may be adjudged from the language of the entire column, and not from here portions.

(l) Exhibit A constitutes and is a true and correct transcript of the oral testimony (in question and answer form) adduced at the trial of Cause No. 2624, styled B. M. Jackson, et al., vs. Joe L. Mayes, et al., in the County Court of Nueces County, Texas, May Term, 1945. It also contains all documentary evidence introduced at such trial, together with all objections and rulings made upon the testimony. The Exhibit does not include colloquialisms, oral statements made by counsel, addresses made by counsel to the jury, or rulings of the Court made after the taking of testimony had been concluded. Respondent is informed and verily believes

that the true substance and effect of such colloquialisms, oral statements and addresses by counsel and rulings and utterances made by the Court after the taking of [fol. 88] testimony had been concluded are contained in the several newspaper items and articles in the several issues of the newspaper publication in the last above mentioned Exhibits, all of which are made a part of this Answer for all intentes and purposes.

f. Respondent Craig admits that Respondent Mulvaney wrote the news articles and news stories published in the issues of the C. C. Caller, the C. C. Times, and the Caller-Times, which are rper-sented and contained in Exhibit C-26, T-26, C-T-27, C-28, T-28, C-29, T-29, C-30, T-30 and T-31, and that the excerpts of such publications set forth in the information and the decree were written by Respondent Mulvaney, but that such excerpts do not contain a full and complete context of the news articles and stories. Reference is therefore made to the last above mentioned Exhibits for full and complete context of such news articles and stories.

G. Respondent Craig says that the Respondent McCracken wrote and composed the column appearing in the "Crow's Nest" in the issue of the Corpus Christi Caller dated May 30th, 1945, which column appears in its full, complete and exact wording and context in Exhibit C-30. In this connection, Respondent Craig says that he did not take any part in the writing of the news articles and news stories of the column published in the issue of the Corpus Christi Caller dated May 30th, 1945. On the other hand, Respondent Craig says that he is publisher of the last above mentioned newspaper publication, and that he did not exercise any direct control, supervision or authority over the editorial policies or writings of such column called the "Crow's Nest", nor did he know of its contents or nature on the occasion and time above referred to until after its publication. In respect to the newspaper articles written by the Respondent Mulvaney, this Respondent says that he did not compose or write them, and did not read them prior to their time of publication, though he did read such newspaper articles, as well as the "Crow's Nest" column, after [fol. 89] the same appeared in the several newspaper publications above referred to.

H. Respondent Craig says that the news articles and news stories publis-ed in the issues of the C. C. Caller and the C. C. Times and the Caller-Times, which are represented and contained in Exhibits C-26, T-26, C-T-27, C. 28, T-28, C-29, T-29, C-30, T-30, C-31 and T-31 were composed and written by Respondent Mulvaney, with the exception of Exhibit C-31, which was written by William Periera from information conveyed to him by the said Respondent Mulvaney; and this Respondent verily believes and charges that the fact to be that such news articles constitute and are a fair, substantially accurate and correct statement of the facts therein contained and set forth.

Fourth

The Grounds upon Which General and Specific Charges of Contempt Are Set Forth in the Information and Decree, and the Respondent's Answer Thereto.

Answering the grounds, both general and special, upon which the Court concludes that the news articles and editorial column, in their entirety and considered together, constitute contempt on the part of Respondent Craig, he makes reply as follows:

A. *As to the charge "That the articles aforesaid in their entirety and considered together, were calculated and intended to falsely present to the public the nature of the proceedings had * * *"*

Respondent Craig denies that in writing and composing the news articles and news stories, the full context of which appear in the Exhibits hereinabove set forth and marked, that the said Mulvaney did calculate or intend to falsely present to the public the nature of the proceedings. On the contrary, this Respondent says that said Respondent Mulvaney is an experienced, careful and accurate news reporter and news writer, and is thoroughly qualified and able to accurately and correctly report the news, such as the news relating to the trial of the forcible entry and detainer suit and all other court proceedings. And in this connection this [fol. 90] Respondent verily believes, and charges the fact to be, that the news articles written by Respondent Mulvaney represented a fairly accurate statement of the nature of the proceedings, the issues of fact, and the contentions of the

parties, and this Respondent says that in the circumstances, viewing the news articles most unfavorably, they do not, under any circumstances, represent a calculated and intended false representation of the nature of the proceedings had in the previously referred to forcible entry and detainer suit. Though this Respondent did not, prior to the publication, read the articles of the said news reporter, Mulvaney, as published in the various issues of newspaper publications hereinabove referred to, he nevertheless says that the writing of all news stories and articles of the C. C. Caller are under his general supervision, and frequently are referred to him for approval and criticism.

B. *As to the charge "* * * that the articles * * * in their entirety and considered together were calculated and intended * * * to compel a different result on the hearing of a new trial"* and that they "*intended and calculated to influence the Court in its ruling on the aforesaid motion for new trial, and that the said publications and circulations were made for the purpose and with the intent * * * to influence and over-awe (the Court in) its deliberations in said pending couse, and were made at a time and under circumstances calculated to affect the force of justice in* said proceedings * * *" Respondent expressly denies that:

(a) The column written by Respondent McCracken and the news articles whitten by Respondent Mulvaney were written with a calculation and intendment on their part to compel a different result on the pending hearing for new trial in the forcible detainer supt;

(b) That the column and the articles were intended and calculate to influence the Court in its ruling on the motion for new trial;

(c) That the publications and circulations thereof were [fol. 91] made for the purpose and with the intent to influence, overawe the Court in respect to its deliberations on the pending cause; or

(d) That under the circumstances existing it was calculated and intended to affect the force of justice in said proceedings.

In connection with the foregoing denials, this Respondent would show that the forcible detainer suit (which was the subject of the newspaper articles and column) continued upon a course so extraordinary and unusual as to bring about these situations:

(a) It developed controversial issues of fact which, though entirely collateral and at times wholly foreign to the determinant fact issues of the case, were nevertheless developed and were especially pursued by the Honorable Joe D. Browning in his inquisition of the witness Burchard; that is to say, the controverted issues of fact in respect to (1) the operation of lotteries and slot machines and the conducting of gambling, poker games and gambling places by one of the interested witnesses; (2) the loss by Burchard of several auditing and bookkeeping accounts because of the influence asserted by him in his testimony to have been exercised upon such customers by one of the witnesses in the case, who was also an interested party in the outcome of the litigation.

(b) It precipitated an adamant and persistent refusal on the part of the members of the jury to obey and comply with the preemptory instructions of the Court to find for the Plaintiffs—the jury refusing for more than 15 hours to obey the instructions of the Court to find for the Plaintiffs because it was against the conscience of the jury to do so, as asserted by several of its members; and the final obedience of the jury to the Court's instructions coming only after one of the counsel for the Defendants had been permitted, without objection of the Court, to make a short address to the jury, advising its members that it would be futile to hold out longer, since under the law they were obliged to adhere to the Court's ruling, though the dictates of [fol. 92] their conscience might be against doing so.

(c) Though being a forcible detainer suit originating in the Justice Court, and being then on appeal from that Court to the County Court where it was tried, it presented a bitter and hard fought case conducted by two competent, prominent and high ranking lawyers at the bar, namely, the Honorable B. D. Tarlton, for Plaintiffs, and the Honorable Walter M. Lewright, for Defendants, who each assumed the lead in the case. The

case created considerable interest among the members of the bar, as well as laymen, and the Court sessions were well attended by the public.

(d) It provoked from the Honorable Joe D. Browning, Judge of the County Court, this most unusual accusative admonition in respect to the writing and publication of the news stories by Respondent Mulvaney, the remonstrances from Judge Browning being made under the following circumstances and colloquy between the parties: On Sunday morning, May 27th, 1945, at about 9 A. M., Judge Browning called in the jury, which he had ordered locked in the jury room after that body had thrice refused to sign the instructed verdict to find for the Plaintiffs, and thereupon asked the jury if the instructed verdict had been signed, to which the Foreman replied in the negative. Judge Browning thereupon advised the jury that he would convene Court at 9 A. M. Monday morning, May 28th, followed by words to the effect that he would await the signing of the verdict until such time as the jury brought it in. At that time, Walter M. Lewright, counsel for Defendant Mayes (against whom the instructed verdict had been given) made an address to the jurors, a substantially correct text of which is to be found in the issue of the C. C. Caller of Monday, May 28th, (Exhibit C-28). In effect, he urged the jurors to go back to the jury room and sign the verdict. The jurors then filed out [fol. 93] and immediately after the last juror had left the Court room, Judge Browning spoke, in substance and effect, these words before the assembly of lawyers, Respondent Mulvaney and Miss Marie Kelly Young, Judge Browning's Clerk and Secretary:

"I want this newspaper man who has been putting all this stuff about the trial, referring to the forcible detainer suit) in the paper to put this in also: that he came to me last night and said I was going to lose because (or on account) of this case,"

meaning that he would lose his office at the next election for County Judge. While speaking, Judge Browning pointed to Respondent Mulvaney, whereupon Mulvany arose and denied that he had made any such statement, and demanded proof of when and where

such a statement had been made. To this request Judge Browning answered in words to this effect:

"Oh, you know where—out there last night." To this statement by the Judge, Respondent Mulvaney replied in words to this effect:

"Judge, you must know that I made no such statement to you last night, or any other time; I am too long in this business ever to make such an injudicious and fool statement, and the only thing I said to you that was remotely close to what you have quoted was, after the jury had twice refused to sign the verdict, I remarked to you: 'Judge, it looks as though you have lost six good men and true.'"

Respondent Mulvaney *then again* denied before the entire group that he had made such a statement, and requested a retraction and also requested the attorneys present to witness that he had not made the statement which the Judge had attributed to him. At this point Miss Marie Kelly Young stod up and made this statement, in substance and effect:

"Why, Judge, that was Mr. Woods (referring to [fol. 94] association counsel LeGrand Woods for Defendant Mayes) who said that to you last night."

Whereupon the attorneys affirmed their belief that no such statement was made by Respondent Mulvaney. Judge Browning thereupon said in words to this effect:

"Aw, skip it, skip it."

Respondent says that because of the unusual circumstances above set forth, the forcible detainer suit kindled public interest and placed upon the forum of public opinion the entire matter, thereby stimulating and inviting public discussion and criticism with respect to the collateral issues, such as gambling, threatening witnesses and measuring the political fate of the Honorable Joe D. Browning. Respondent says that the latitude and scope of fair and legitimate discussion of the pending trial was not only broadened and opened into wide avenues, but there was justly invited criticisms and discussion as a matter of public interest. This Respondent further says that the news articles written and composed by Respondent Mulvaney and the column

written and composed by Respondent McCracken, when the complete context thereof is considered, cannot be construed to be (and were not) a clear and present danger to the orderly and fair administration of justice, or to preserve judicial impartiality at the hands of a Judge possessed of a mind or reasonable fortitude. This Respondent further says that to regard the news articles and column as being a substantial influence upon the source of justice "would be to imput- to Judge (including Judge Browning) a lack of firmness, wisdowm and honor," which this Respondent will never accept as a major premise and is unfounded.

C. As to the charge that the articles "*falsely stated that Mayes was an ex-insurance man, when in truth and in fact his principal business during the time the said cause was pending was and is the insurance business.*"

This Respondent denies that Respondent Mulvaney falsely stated in the news articles that Mayes was an ex-insurance [fol. 95] man, or that he willfully intended to do so.

D. As to the charge "*that said articles and all of them failed to state the terms of the contract declared on by Plaintiffs; they failed to state that the check which the Defendant Burchard testified he had proffered was tendered seven days late, and that the said check was post-dated thirty days from the date tendered, and would not, in consequence, be considered* a legal tender of rent money."

(a) Respondent denies that the news articles failed to state the material portions of the contract necessary to an understanding of the determinent issues in the case. In this connection this Respondent refers to that portion of Respondent McCracken's Answer under Subdivision (a) of Part D, of the Fourth part of the Answer, and says that such portion of the Answer is hereby referred to and made a part of this Answer insofar as it applies to this Respondent, and that likewise Subdivision (b), of Part D, of the Fourth Part is also here now referred to and made a part of this Respondent's Answer insofar as the same applies to him.

E. Answering further in regard to the various charges that "the said articles" contained certain

designated omissions referred to in the last paragraph of Page 5 of the Information, and on the corresponding page and paragraph of the Decree, this Respondent answers as follows:

(a) Respondent expressly denies that the articles omitted such material evidence that would have enabled the public generally to form a fair estimate of the real nature of the controversy.

(b) In this connection, Respondent says that the context of the publications, when considered together, clearly show that it was the main and paramount contention of Plaintiffs that the lease with Mayes had expired by its own terms on March 15th, [fol. 96] 1945, because of the failure of Defendant to pay to Plainfiffs on such date the sum of $275.00; and that no payment subsequently tendered would prolong or extend the lease, especially when refused by Plaintiffs, as in this case. Respondent says that from the context of the news articles, when considered as a whole, it was clearly evident to those reading the news items and articles that this legal contention served as Plaintiffs' real basis for the bringing of the suit, the asking for an instructed verdict and entry of judgment for Plaintiffs; in short, it served as the controlling basis of recovery for all relief sought and obtained by plaintiffs; and Respondent, therefore, denies that the articles failed to state the grounds of the motion for instructed verdict, when the controlling ground for Plaintiffs' recovery was obvious and oft repeated in the said news articles.

(c) Respondent denies that the reference to the motion as being a "one page motion" was in any manner derogatory or could serve as the valid basis for any act of contempt as against Respondent. In this connection, Respondent says that it is a fact that no argument was permitted by the Court on Plaintiffs' motion for an instructed verdict, though this Respondent is informed and verily believes and charges the fact to be that Plaintiffs' counsel was prepared to argue the motion, as well as Defendants' counsel to make reply thereto, in the event the Court.

desired to invite and permit such argument; and, furthermore, this Respondent is informed and verily believes, and therefore charges it to be a fact, that when Defendants' counsel argued this motion for instructed verdict, Plaintiffs' counsel replied thereto, but did not then and there attempt to argue the motion of Plaintiffs for an instructed verdict, which Plaintiffs' counsel was subsequently to file.

[fol. 98] G. Respondent denies that the news articles failed to state "that the arrangements under which the premises were operated had been in existence for some months before Defendant Mayes was inducted in the Army," this Respondent says that such omission, if omission it was, was not deliberate or for the purpose of misleading; was immaterial, unimportant, and was not regarded by Respondent as worthy of mention.

(e) Respondent says that it is true that the news articles or "Crow's Nest" column failed to mention that Franklin Flato, Fred Flato, Lt. Robert Flato and Dr. Harry G. Heaney were joint owners with Bush M. Jackson of premises leased to Defendant Mayes, and that all such owners were actually Plaintiffs and highly respected citizens; but in this connection Respondent would show the following: the lease was signed by Bush M. Jackson, as agent for all the Lessor owners of the premises leased to Mayes; that Bush M. Jackson testified to his joint ownership of the leased premises, and that the suit was brought in behalf of all owners, though none of the other owners appeared in person to testify or take an active part in the case. Moreover, the transcript of the proceedings in the forcible detainer suit shows that all acts, dealings and transactions with reference to the making of the lease were handled exclusively by Bush M. Jackson, as agent, and that he was manager of the building, and in fact was active in instituting and prosecuting the suit in the interest of all concerned.

F. Respondent denies that the news articles written by Respondent Mulvaney *needlessly* repeated and emphasized the fact that the Defendant Mayes was in the

armed services; moreover, Respondent says that even if the charge were true, which is denied, it serves as no valid basis for a charge of contempt.

[fol. 97] G. Respondent denies that the news articles needlessly and without cause repeated, reiterated and over-emphasized the fact that no argument was heard on Plaintiffs' motion for instructed verdict; and Respondent says that due and sufficient prominence was given in the issue of the C. C. Caller-Times (Exhibit C-T-27), at Page 8, of the fact that Defendants' motion for an instructed verdict was argued by Defendants' counsel at length, and that a ruling on the motion was withheld until all evidence was in.

H. Respondent says that the failure to state in the news articles that the jury had no right to conclude "what the law might be upon the proof of any given set of facts, but that they were duty bound to receive the law from the Court," and that "the Court was under no duty to hear arguments or the citation of authorities from either party," constitutes no valid ground or case upon which contempt charges may be lodged against this Respondent.

I. Respondent expressly denies that the news articles written by Respondent Mulvaney and published in the several issues of the newspaper publications could reasonably be construed as meaning, or as intended to inform the reading public, "that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen, unable because of his service to his country, to defend himself of his rights in and to valuable property, and that counsel for Plaintiffs and the Court aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of their purpose," and Respondent denies "that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the Plaintiffs, their counsel and the Court were in fact corrupt, improper and unlawful."

[fol. 99] Respondent says that any fair reading of the articles will not produce any such meaning as is charged, and that there is no factual basis in the articles to support such charges made against Respondent.

J. Respondent denies that the articles, however viewed, were intended and calculated to reflect upon the integrity of the Court, or bring it into disrepute and prejudice, or that the said publications and circulations were made for the purpose and intent of scandalizing the Court. In this connection, Respondent says that under the law of the land, the writing and preparation of said articles cannot serve as a valid basis for the punishment for contempt of Court; and this Respondent says that they cannot serve as any predicate for valid charges of contempt.

Premises Considered, Respondent says:

(1) That the judgment of contempt is void because it clearly violates the freedom of press and of speech guaranteed by the Fourteenth and Fifth Amendments to the Constitution of the United States of America.

(2) The judgment of contempt is void because it violates the freedom of the press and of speech guaranteed by Article 1, Section 8, and Article I, Sec. 19 of the Constitution of Texas.

(3) The articles, when considered in their entirety, present no clear and present danger to the overthrow of judicial impartiality or to the administration of impartial justice at the hands of a Judge possessed with a mind of reasonable fortitude, and consequently, Respondent says that said Articles cannot validly be the basis for any judgment of contempt.

Wherefore, this Respondent prays that said judgment not be made final, but that same be voided; that he be discharged from the rule and order of said judgment of contempt; and that the Court decree and find that he is not guilty of the charges in the information and set forth in the decree nisi; and for such other and further relief, both general [fol. 100] and special, which he may be entitled to, and hereby prays for.

Kleberg, Eckhardt, Mobley & Roberts. By Marcellus G. Eckhardt, 510 Jones Building, Corpus Christi, Texas; Attorneys for Respondent, Conway C. Craig.

*Duly sworn to by Conway C. Craig. Jural omitted in printing.*

[File endorsement omitted.]

[fol. 101] IN THE COUNTY COURT OF NUECES COUNTY

No. 3626

In the Matter of CONWAY C. CRAIG, BOB McCRACKEN and TOM MULVANEY

ANSWER OF RESPONDENT, BOB McCRACKEN—Filed July 24, 1945

To the writ of scire facias to show cause why there should not be made final and absolute the decree nisi, ordering, adjudging and decreeing that this Respondent, together with Respondents Conway C. Craig and Tom Mulvaney, be adjudged guilty of contempt of Court and punishing them, and each of them, "by confinement in the County Jail of Nueces County, Texas, for three days, unless they purge themselves thereof," the Respondent, Bob McCracken, answers as follows:

*First*

He says that the decree nisi is void upon its face. The information or affidavit upon which the decree is based stated no grounds upon which to found a valid order or judgment of contempt against Respondent. Any judgment of contempt so based would deprive Respondent of his liberty and freedom of speech and of the press without due process of law, guaranteed to him by the 14th Amendment to the Constitution of the United States, and by Article 1, Section 8 of the Constitution of the State of Texas.

*Second*

He says that all those portions of the information and decree charging that the publications or portions of same were intended and calculated to scandalize and reflect upon the integrity of the Court and bring it into disrepute and prejudice, states no valid ground for a judgment of contempt and should, therefore, be stricken.

*Third*

Answering further, if required to do so, but without in any manner waiving the foregoing, this Respondent would [fol. 102] show the following:

The Status and Position Occupied in General by the Several Respondents with Respect to Newspaper Publications of the Caller-Times Publishing Company:

A. The Caller-Times Publishing Company is a corporation, duly incorporated under the laws of this State, having its principal offices and place of business in the City of Corpus Christi, County of Nueces, State of Texas. It owns and causes to be published under due and proper permit three publications, namely: (a) The Corpus Christi Caller, a morning newspaper, (b) The Corpus Christi Times, an afternoon newspaper, both of such publications being daily newspapers of general circulation in the City of Corpus Christi and County of Nueces; and (c) The Corpus Christi Caller-Times, being a Sunday newspaper of general circulation in the same City and County last mentioned.

B. Respondent, Conway C. Craig, is the Publisher of The Corpus Christi Caller, The Corpus Christi Times, and The Corpus Christi Caller-Times, and, as such, has general supervision and control over, and directs the business affairs of the corporation and its several newspaper publications. He does not edit or write editorials, newspaper stories or articles in either of the newspaper publications, nor does he, in his capacity as Publisher, supervise or direct the writing of editorials, newspaper stories or columns printed in either of the three newspaper publications here involved. Respondent Craig was acting in the capacity and status of Publisher of the several newspaper publications during all the time and occasions mentioned in the decree nisi and accompanying affidavit.

C. Respondent, Bob McCracken, is Managing Editor of the several newspaper publications, consisting of The Corpus Christi Caller, The Corpus Christi Times, and The Corpus Christi Caller-Times. He writes the column the "Crow's Nest" in the Corpus Christi Caller and the Corpus Christi Caller-Times. This column called the "Crow's [fol. 103] Nest", though written for such publication by Respondent McCracken, nevertheless represents the independent views, opinions and conceptions of Respondent

McCracken, and does not, in any case, necessarily reflect the policy of the several newspaper publications, or of the editors, publisher and newswriters thereof. At the end of the "Crow's Nest" columns, this notation, in substance and effect, appears at the foot of each publication of the column:

> "This column is written for the Caller (or the Caller-Times) by Bob McCracken. Opinions expressed are those of the writer and do not necessarily reflect the policy of this newspaper."

Respondent McCracken also writes other editorials in the several newspaper publications for which he is Managing Editor. Among other things, he also has general supervision of all newswritings and stories prepared and written by the various reporters for the three newspaper publications for which he is Managing Editor. During all of the times and occasions referred to in the decree nisi and the accompanying affidavit, he was acting in the above-described capacity and status as Managing Editor of the several newspaper publications above mentioned.

D. Respondent, Tom Mulvaney, is a news writer and news reporter for each of the three newspaper publications. As such, he writes news reports and factual news narrative, including especially the news reports in connection with the trial and disposition of cases in all the State Courts holding terms in Corpus Christi, Texas, and also the United States District Court for the Southern District of Texas, when sitting in Corpus Christi, Texas. During all of the times and occasions referred to in the decree nisi, as well as in the accompanying affidavit, he was acting in the above described capacity and status as news writer in respect to the newspaper publications last mentioned.

The Newspaper Writings and the Editorial Set Forth in the Decree Nisi and Being the Basis for the Contempt [fol. 104] Adjudged to Have Been Committed by Respondents.

E. As a part of this Respondent's Answer, there is filed herewith the following Exhibits which, though filed under separate cover, are nevertheless made as much a part of this pleading as if completely copied herein:

(a) *Exhibit C-26*, being a true and correct photostatic copy of the first page of Section B of the original

publication of the Corpus Christi Caller of Saturday, May 26, 1945.

(b) *Exhibit T-26,* being a true and correct photostatic copy of the first page of the original publication of the Corpus Christ Times of Saturday May 26, 1945.

(c) *Exhibit C-T-27,* being a true and correct photostatic copy of the first and eighth pages of the original publication of the Corpus Christi Caller-Times of Sunday, May 27th, 1945.

(d) *Exhibit C-28,* being a true and correct photostatic copy of the first and third pages of the original publication of the Corpus Christi Caller, of Monday, May 28th, 1945.

(e) *Exhibit T-28,* being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Times of Mon-ay, May 28th, 1945.

(f) *Exhibit C-29,* being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Caller of Tuesday, May 29th, 1945.

(g) *Exhibit T-29,* being a true and correct photostatic copy of the first and eighth pages of the original publication of the Corpus Christi Times of Tuesday, May 29th, 1945.

(h) *Exhibit C-30,* being a true and correct photostatic copy of the first and eighth pages of the original publication of the Corpus Christi Caller of Wednesday, May 30th, 1945.

(i) *Exhibit T-30,* being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Times of Wednesday, May 30th, 1945.

[fol. 105] (j) *Exhibit C-31,* being a true and correct photostatic copy of the first pages of the issue of the Corpus Christi Caller of Thursday, May 31st, 1945.

(k) *Exhibit T-31,* being a true and correct photostatic copy of the first and tenth pages of the issue of the Corpus Christi Times of Thursday, May 31, 1945.

The decree nisi and the accompanying information contain only portions or partial excerpts of the column called the "Crow's Nest", the news-writings and articles published in the several daily issues of the Corpus Christi Called, the Corpus Christi Caller-Times and the Corpus Christi Times during the period commencing May 26th, 1945, to May 31st, 1945, both inclusive. The foregoing Exhibits contain the full, complete and correct content of such columns, news-writings and articles, and they are made a part of this Answer so that the full meaning and purport of the column and articles may be obtained, not from portions or excerpts thereof, but from the full and complete context of the column, news stories and articles.

The column published in the Corpus Christi Caller, of the issue of May 30th, 1945, is likewise set forth in its entirety in Exhibit C-30 so that its meaning, intendments and effect may be adjudged from the language of the entire column, and not from mere portions.

(1) Exhibit A constitutes and is a true and correct transcript of all the oral testimony (in question and answer form) adduced at the trial of Cause No. 2624, styled B. M. Jackson, et al., vs. Joe L. Mayes, et al., in the County Court of Nueces County, Texas, May Term, 1945. It also contains all documentary evidence introduced at such trial, together with all objections and rulings made upon the testimony. The Exhibit does not include colloquialisms, oral statements made by counsel, addresses made by counsel to the jury, or rulings by the Court made after the taking of testimony [fol. 106] had been concluded. Respondent is informed and verily believes that the true substance and effect of such colloquialsims, oral statements and addresses by counsel and rulings and utterances made by the Court after the taking of testimony had been concluded are contained in the several newspaper items and articles in the several issues of the newspaper publications in the last above mentioned Exhibits, all of which are made a part of this Answer for all intents and purposes.

F. Respondent McCracken admits that Respondent Mulvaney wrote the news articles and news stories published in the issues of the C. C. Caller, the C. C. Times, and the Caller-Times, which are represented and contained in Ex-

hibit C-26, T-26, C-T-27, C-28, T-28, C-29, T-29, C-30 and T-31, and that the excerpts of such publications set forth in the information and the decree were written by Respondent Mulvaney, but that such excerpts do not contain a full and complete context of the news articles and stories. Reference is therefore made to the last above-mentioned Exhibits for full and complete context of such news articles and stories.

G. Respondent McCracken says that he wrote and composed the column appearing in the Crow's Nest in the issue of the Corpus Christi Caller dated May 30, 1945, which column appears in its full complete and exact wording and context in Exhibit C-30. Respondent McCracken says that neither Respondent Mulvaney nor Respondent Craig took any part in the writing, nor did either of them assist Respondent McCracken in the writing or composition of the column in the issue of the C. C. Caller dated May 30, 1945. On the contrary, Respondent McCracken says that he is the sole author and composer thereof, and that neither the Respondent Mulvaney nor Respondent Craig exercised any control, supervision or authority over the editorial policies or writings of such column called the "Crow's Nest," nor did they or either of them know of its contents or nature on the occasion and time above referred to prior to its publication.

H. Respondent McCracken says that the news articles [fol. 107] and news stories published in the issues of the C. C. Caller and the C. C. Times and the Caller-Times, which are represented and contained in Exhibits C-26, T-26, C-T-27, C-28, T-28, C-29, T-29, C-30, T-30, C-31 and T-31 were composed and written by Respondent Mulvaney, with the exception of Exhibit C-31, which was written by William Periera from information conveyed to him by the said Respondent Mulvaney; and this Respondent verily believes and charges the fact to be that such news articles constitute and are a fair, substantially accurate and correct statement of the facts therein contained and set forth.

*Fourth*

The Grounds Upon Which General and Specific Charges of Contempt Are Set Forth In the Information and Decree, and the Respondent's Answer Thereto.

Answering the grounds, both general and special, upon which the Court concludes that the news articles and edi-

torial column, in their entirety and considered together, constitute contempt on the part of Respondent McCracken, he makes reply as follows:

A. As to the charge: "*That the articles aforesaid, in their entirety and considered together, were calculated and intended to falsely present to the public the nature of the proceedings had* • • •"

Respondent McCracken denies that in writing and composing the news articles and news stories, the full context of which appears in the Exhibits hereinabove set forth and marked, that the said Mulvaney did calculate or intend to falsely present to the public the nature of the proceedings. On the contrary, this Respondent says that said Respondent Mulvaney is an experienced, careful and accurate news-reporter and news-writer, and is thoroughly qualified and able to accurately and correctly report the news, such as the news relating to the trial of the forcible entry and detainer suit and all other court proceedings. And in this connection this Respondent verily believes, and charges the fact to be, that the news articles written by [fol. 108] Respondent Mulvaney presented a fairly accurate statement of the nature of proceedings, the issues of fact, and the contentions of the parties, and this Respondent says that in the circumstances, viewing the news articles most unfavorably, they do not, under any circumstances, represent a calculated and intended false representation of the nature of the proceedings had in the previously referred to forcible entry and detainer suit. Though this Respondent did not, prior to publication, read the articles of the said news reporter, Mulvaney, as published in the various issues of newspaper publications herein-above referred to, he nevertheless says that the writing of all news stories and articles of the C. C. Caller are under his general supervision, and frequently are referred to him for approval and criticism.

B. As to the charge: • • • *that the articles* • • • *in their entirety and considered together were calculated and intended* • • • *to compel a different result on the hearing a new trial*" and that they "*intended and calculated to influence the Court in its ruling on the aforesaid motion for new trial, and*

*that the said publications and circulations were made for the purpose and with the intent * * * to influence and overawe (The Court in) its deliberations in said pending cause, and were made at a time and under circumstances calculated to affect the force of justice in said proceedings * * *"*

Respondent expressly denies that:

(a) The column written by Respondent McCracken and the news articles written by Respondent Mulvaney were written with a calculation and intendment on their part to compel a different result on the pending hearing for new trial in the forcible detainer suit;

(b) That the column and the articles were intended and calculated to influence the Court in its ruling on the motion for new trial;

(c) That the publications and circulations thereof [fol. 109] were made for the purpose and with the intent to influence or over-awe the Court in respect to its deliberations on the pending cause; or,

(d) That under the circumstances existing it was calculated and intended to affect the force of justice in said proceedings.

In connection with the foregoing denials, this Respondent would show that the forcible detainer suit (which was the subject of the newspaper articles and column) continued upon a course so extraordinary and unusual as to bring about these situations:

(a) It developed controversial issues of fact which, though entirely collateral and at times wholly foreign to the determinant fact issues of the case, were nevertheless developed and were especially pursued by the Honorable Joe D. Browning in his inquisition of the witness Burchard; that is to say, the controverted issues of fact in respect to: (1) the operation of lotteries and slot machines and the conducting of gambling, poker games and gambling places by one of the interested witnesses; (2) the loss of Burchard of several auditing and bookkeeping accounts because of the influence asserted by him in his testimony to have been exercised upon such customers by one of the witnesses

in the case, who was also an interested party in the outcome of the litigation.

(b) It precipitated an adamant and persistent refusal on the part of the members of the jury to obey and comply with the peremptory instructions of the Court to find for the Plaintiffs—the jury refusing for more than 15 hours to obey the instructions of the Court to find for the Plaintiffs because it was against the conscience of the jury to do so, as asserted by several of its members; and the final obedience of the jury to the Court's instructions coming only after one of the counsel for the Defendants had been permitted, without objection of the Court, to make a short address to the jury, advising its members that it would be futile to [fol. 110] hold out longer, since under the law they were obliged to adhere to the Court's ruling, though the dictates of their conscience might be against doing so.

(c) Though being a forcible detainer suit originating in the Justice Court, and being then on appeal from that Court to the County Court where it was tried, it presented a bitter and hard fought case conducted by two outstanding and competent trial lawyers at the bar, namely, the Honorable B. D. Tarlton, for Plaintiffs, and the Honorable Water M. Lewright, for Defendants, who each assumed the lead in the case. The case created considerable interest among the members of the bar, as well as laymen, and the Court sessions were well attended by the public.

(d) It provoked from the Honorable Joe D. Browning, Judge of the County Court, this most unusual accusative admonition in respect to the writing and publication of the news stories by Respondent Mulvaney, the remonstrances from Judge Browning being made under the following circumstances and colloquy between the parties: On Sunday morning, May 27th, 1945, at about 9 A. M., Judge Browning called in the jury, which he had ordered locked in the jury room after that body had thrice refused to sign the instructed verdict to find for the Plaintiffs, and thereupon asked the jury if the instructed verdict had been signed, to which the Foreman replied in the negative. Judge

Browning thereupon advised the jury that he would convene Court at 9 A. M. Monday morning, May 28th, followed by words to the effect that he would await the signing of the verdict until such time as the jury brought it in. At that time, Walter M. Lewright, counsel for Defendant Mayes (against whom the instructed verdict had been given) made an address to the jurors a substantially correct text of which is to be found in the issue of the C. C. Caller of Monday, May 28 (Exhibit C-28). In effect, he urged the jurors to go back to the jury room and sign the verdict. The jurors then [fol. 111] filed out and immediately after the last juror had left the Court room, Judge Browning spoke, in substance and effect, these words before the assembly of Lawyers, Respondent Mulvaney and Miss Marie Kelly Young, Judge Browning's Clerk and Secretary:

> "I want this newspaper man who has been putting all this *stuff* about the trial (referring to the forcible detainer suit) in the paper to put this in also: that he came to me last night and said I was going to lose because (or on account) of this case,"

meaning that he would lose his office at the next election for County Judge. While speaking, Judge Browning pointed to Respondent Mulvaney, whereupon Mulvaney arose and denied that he had made any such statement, and demanded proof of when and where such a statement had been made. To this request Judge Browning answered in words to this effect:

> "Oh, you know where—out there last night."

To this statement by the Judge Respondent Mulvaney replied in words to this effect:

> "Judge, you must know that I made no such statement to you last night, or any other time. I am too long in this business ever to make such an injudicious and fool statement, and the only thing I said to you that was remotely close to what you have quoted was, after the jury had twice refused to sign the verdict, I remarked to you: 'Judge, it looks as though you have lost six good men and true.'"

Respondent Mulvaney then again denied before the entire group that he had made such a statement, and

requested a retraction and also requested the attorneys present to witness that he had not made the statement which the Judge had attributed to him. At this point Miss Marie Kelly Young stood up and made this statement, in substance and effect:

[fol. 112] "Why, Judge, that was Mr. Woods (Referring to associate counsel LeGrand Woods for Defendant Mayes) who said that to you last night."

Whereupon the attorneys affirmed their belief that no such statement was made by Respondent Mulvaney. Judge Browning thereupon said, in words to this effect: "Aw, skip it, skip it."

Respondent says that because of the unusual circumstances above set forth, the forcible detainer suit kindled public interest and placed upon the forum of public opinion the entire matter, thereby stimulating and inviting discussions and criticism with respect to the collateral matters, such as gambling, threatening witnesses and measuring the political fate of the Honorable Joe D. Browning. Respondent says that the latitude and scope of fair and legitimate discussion of the pending trial was not only broadened and opened into wide avenues, but there was justly invited criticisms and discussion as a matter of public interest. This Respondent further says that the news articles written and composed by Respondent Mulvaney and the column written and composed by this Respondent, when the complete context thereof is considered, cannot be construed to be, and were not, a clear and present danger to the orderly and fair administration of justice, or to the preservation of judicial impartiality at the hands of a Judge possessed of a mind of reasonable fortitude. This Respondent further says that to regard the news articles and column as being a substantial influence upon the force of justice "would be to impute to Judges, including Judge Browning, a lack of firmness, wisdom or honor," which this Respondent will never accept as a major premise, and is unfounded.

C. As to the charge that the articles "*falsely stated that Mayes was an ex-insurance man, when in truth and in fact his principal business during the time the said cause was pending was and is the insurance business.*"

This Respondent denies that Mulvaney falsely stated that [fol. 113] Mayes was an ex-insurance man, or that he willfully intended to do so. In this connection, and as a basis for his interpretation that Mayes could be described as an ex-service man, Respondent would show: the undisputed testimony in the forcible detainer suit against Mayes showed Mayes to have been inducted into the United States armed forces on January 17, 1945, and that he was at the time of the trial in the United States Army. While testifying in the forcible detainer suit, Mayes was asked these questions and gave the following answers:

"Q. Prior to your departure from Corpus Christi what business were you in?

"A. I own this business, and I am also in the general insurance business.

"Q. You owned what business?

"A. Joe L. Mayes Insurance Agency, which is an insurance business."

From the foregoing testimony, Respondent says that it might be fairly interpreted that Mayes was an ex-insurance man in the sense that he was not now actively engaged in his personal and individual capacity of selling insurance, though he may have owned an interest in the general insurance agency. In all events, this Respondent says the distinction is unimportant and is upon an immaterial collateral issue; that it could not serve as a coercive influence presenting clear and present danger so as to actually threaten the outcome of the trial by overthrowing judicial impartiality. Even if the statement were not strictly accurate (which this Respondent denies), it cannot and does not in the circumstances amount to an act of contempt of court as that term is understood and comprehended under the law of the land.

D. As to the charge "*That said articles and all of them failed to state the terms of the contract declared upon by Plaintiffs; they failed to state that the check which the Defendant Burchard testified he had proffered*

[fol. 114] *was tendered seven days late, and that the said check was post-dated thirty days from the date tendered, and would not, in consequence, be considered a legal tender of rent money.*"

(a) Respondent denies that the news articles failed to state the material portions of the contract necessary to an understanding of the determinant issues in the case, viz:

(1) Whether the so-called option clause in the contract extending its duration for another year upon payment of $275.00 per month, instead of $250.00 per month theretofore provided, had the effect of terminating the contract in the event that proper tender was not made; and

(2) Whether the so-called option in the contract to thus extend the lease for a year had been timely and properly exercised in contemplation of law by the Defendant Mayes, acting through his attorney-in-fact, Burchard.

In this connection, Respondent says that the issue of the C. C. Caller-Times of Sunday, May 27th, 1945, (Exhibit C-T-27), and the issue of the C. C. Caller of May 30th, 1945 (Exhibit C-30), when considered together, succinctly state the essential terms of the contract reflecting upon the option clause and the acts done and performed by the Defendant Mayes in the attempt to exercise the option; and reference is here made to such Exhibits.

(b) Respondent would show that the articles made clear that the check for $275.00 was tendered "later", meaning subsequent to March 15th, the date the contract was terminated (see Exhibit C-30), and that on March 19th, when it was called to the attention of Burchard, as attorney-in-fact for Mayes, that the lease contract had expired, he, Burchard, had offered to pay the difference between the $250.00 check previously delivered to Plaintiffs on March 15th (which was then in possession of the Plaintiffs), and the required $275.00, but that same was refused. Moreover, the news articles complained of show, when considered as a whole, that the Plaintiffs concluded that the contract was [fol. 115] terminated on March 15th, and consequently, that they would accept no checks or legal tender of any character after that date, since Plaintiffs desired to avail themselves

of their legal right to terminate the lease contract, which they contended expired on March 15th, for want of proper payment at that time of the $275.00 monthly installment. Respondent says that while it is true the news articles did not state that the $275.00 check tendered by Burchard was post-dated, that such omission nevertheless became immaterial and unimportant in view of the Plaintiffs' position last above stated. Respondent says that clearly such omission constitutes no clear and present danger to the preservation of judicial impartiality and the wrongful administration of justice.

E. Answering further in regard to the various charges that "the said articles" contained certain designated omissions referred to in the last paragraph of Page 5, of the Information, and on the corresponding page and paragraph of the Decree, this Respondent answers as follows:

(a) Respondent expressly denies that the articles omitted *much* material evidence that would have enabled the public generally to form a fair estimate of the real nature of the controversy.

(b) In this connection, Respondent says that the context of the publications, when considered together, clearly show that it was the main and paramount contention of Plaintiffs that the lease with Mayes had expired by its own terms on March 15th, 1945, because of the failure of Defendant to pay to Plaintiffs on such date the sum of $275.00; and that no payment subsequently tendered would prolong or extend the lease, especially when refused by Plaintiffs, as in this case. Respondent says that from the context of the news articles, when considered as a whole, it was clearly evident to those reading the news items and articles that this legal contention served as Plaintiffs' real [fol. 116] basis for the bringing of the suit, the asking for an instructed verdict and entry of judgment for Plaintiffs; in short, it served as the controlling basis of recovery for all relief sought and obtained by Plaintiffs; and Respondent, therefore, denies that the articles failed to state the grounds of the motion for instructed verdict, when the controlling ground for Plaintiffs' recovery was obvious and oft repeated in the said news articles.

(c) Respondent denies that the reference to the motion as being a "one page motion" was in any manner derogatory or could serve as the valid basis for any act of contempt as against Respondent. In this connection, Respondent says that it is a fact that no argument was permitted by the Court on Plaintiffs' motion for an instructed verdict, though this Respondent is informed and verily believes and charges the fact to be that Plaintiffs' counsel was prepared to argue the motion, as well as Defendants' counsel to make reply thereto, in event the Court desired to invite and permit such argument; and, furthermore, this Respondent is informed and verily believes, and therefore charges it to be a fact, then when Defendants' counsel argued their motion for instructed verdict Plaintiffs' counsel replied thereto, but did not then and there attempt to argue the motion of Plaintiffs for an instructed verdict, which Plaintiffs' counsel was subsequently to file.

(d) As to the charge that the articles failed to state "that the arrangements unde- which the premises were operated had been in existence for some months before Defendant Mayes was inducted in the Army," this Respondent says that such ommission, if one it is, is so immaterial and unimportant and so completely removed from a clear and present danger to the administration of justice or the destruction of judicial impartiality, in the instant case, as to have no worth or consideration as a valid basis for a charge of contempt.

(e) Respondent says it is true that the news articles [fol. 117] or Crow's Nest column failed to mention that Franklin Flato, Fred Flato, Lt. Robert Flato, and Dr. Harry G. Heaney were joint owners with Bush M. Jackson of premises leased to Defendant Mayes, and that all such owners were actually Plaintiffs and highly respected citizens; but in this connection, Respondent would show the following: The lease was signed by Bush M. Jackson, as agent for all the Lessor owners of the premises leased to Mayes; that Bush M. Jackson testified to his joint ownership of the leased premises, and that suit was brought in behalf of all owners, though none of the other owners appeared in person

to testify or take an active part in the case. Moreover, the transcript of the proceedings in the forcible detainer suit shows that all acts, dealings and transactions with reference to the making of the lease were handled exclusively by Bush M. Jackson, as agent, and that he was manager of the building, and in fact was active in instituting and prosecuting the suit in the interest of all concerned. The newspaper accounts were, in this respect, the natural result of the way in which the trial was conducted.

F. Respondent denies that the news articles written by Respondent Mulvaney *needlessly* repeated and emphasized the fact that the Defendant Mayes was in the armed service; moreover, Respondent says that even if the charge were true, which is denied, it serves as no valid basis for a charge of contempt.

G. Respondent denies that the news articles needlessly and without cause repeated, reiterated and over-emphasized the fact that no argument was heard on Plaintiffs' motion for instructed verdict; and the Respondent says that due and sufficient prominence was given in the issue of the C. C. Caller-Times (Exhibit C-T-27) at page 8 of the fact that Defendants' motion for an instructed verdict was argued by Defendants' counsel at length, and that a ruling on the motion was withheld until all evidence was in.

H. Respondent says that the failure to state in the news [fol. 118] articles that the jury had no right to conclude "what the law might be upon the proof or any given set of facts, but that they were duty bound to receive the law from the Court," and that "the Court was under no duty to hear arguments or the citation of authorities from either party," constitutes no valid ground or cause upon which contempt charges may be lodged or sustained against the Respondent, nor did same even remotely constitute a present danger to the overthrow of judicial impartiality and the orderly administration of justice.

I. Respondent expressly denies that the news articles written by Respondent Mulvaney and published in the several issues of the newspaper publications could reasonably be construed or tortured into a meaning that they were willfully and knowingly written and published for the pur-

pose of informing the reading public "that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen, unable because of his service to his country, to defend himself, of his rights in and to valuable property, and that counsel for plaintiffs and the court aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful."

Respondent says that any fair reading of the articles will not produce any such meaning as is charged, and that there is no factual basis in the articles to support such charges against Respondent.

J. Respondent denies that the articles however viewed were intended and calculated to reflect upon the integrity of the Court, or bring it into disrepute and prejudice, or that the said publications and circulations were made for [fol. 119] the purpose and intent of scandalizing the Court. In this connection Respondent says that under the law of the land, that the writing and preparation of articles which tend to scandalize or bring the Court into disrepute or to discredit the Judge personally, cannot serve as a valid basis for the punishment for contempt of Court; and this Respondent says that if such articles do have that effect, which he expressly denies, they cannot serve as any predicate for valid charges of contempt.

Fifth

Respondent says that the column called the "Crow's Nest" was written by him, as previously stated, and was published in the Corpus Christi Caller-Times Sunday, May 27, 1945 (Exhibit C-T-27). Respondent says that when the column is considered in its entirety, giving due effect to the real spirit and intendment to be gained from the entire context, the following rationalization would be obvious and correct:

(1) The column assumes as a major premise that the office of County Judge, being a judicial office, should be filled, not only in Nueces County, but in all

the Counties of this State, by a lawyer, a member of the bar; and that the present case is just another illustration of the validity of such a conviction. This criticism, is objective and presents a basic fault of the Constitution of Texas in permitting the office to be occupied by a layman.

(2) The column as a whole likewise assumes, as an important premise, that the author, a layman, received the impression from what occurred at the trial of the forcible detainer suit that the Court was not according to both sides a full and fair hearing by reason of the manner in which the case was being handled and conducted. The column plainly states that the writer, McCracken, did not know on which side justice lay. He clearly stated that he was not attempting to influence the decision one way or the other, since he was not qualified as a layman to say how the case should be decided under the law and facts. The clear [fol. 120] purport of the column was that what the author was criticising was the Court's apparent failure to accord a full and fair hearing before deciding. It was the procedure—the method, the want of due process, refusal to hear both side-, impartially—that constituted the gravaman of the complaint in the mind of the columnist.

(3) The criticism in the column was purely impersonal, in the sense that it was not directed at the result of the trial. The writer expressly disclaimed being dissatisfied with the decision; his dissatisfaction was leveled at the Court's method of trying the case, and in disposing of it without giving both sides an opportunity to be fully heard on the motion for instructed verdict which was filed by the Plaintiffs. It is of no moment that the impression created on the mind of the writer was incorrect. This was a natural impression created upon the mind of laymen, even though it may have been mistaken or utterly unfounded, from the standpoint of a lawyer.

(4) The writer expressly stated in his column that the ultimate decision of the case rested with the Court, and that he, the writer, did not propose to say how the case should be decided under the facts and the law.

The whole burden of the writer's complaint was directed at the manner in which the Court conducted the trial. It is quite true that the writer did suggest that in view of the bias that had been manifested by the Judge that a new trial should be granted and that the case should then be tried by an impartial Judge. But this was not an attempt to induce the Court to grant a new trial *and decide the case the other way.* Even if it be assumed that the writer was mistaken in his view that the Court was biased, the fact remains that the method of conducting the trial was what created the impression upon the lay mind; and, being under the impression that the Judge was biased in the case, the writer did not seek to induce him to decide [fol. 121] the case for or against either party. He merely advocated a trial by an impartial Judge.

There was no attempt to influence the Court by demanding or advocating a decision in behalf of either party or against either party. It was simply a plea for the right of the litigent to have an impartial hearing. That the impression created upon the writer was the natural effect of what transpired at the trial is shown by the unanimous action of the jury.

Premises considered, Respondent says:

(1) That the judgment of contempt is void because it clearly violates the freedom of press and of speech guaranteed by the Fourteenth and Fifth Amendments to the Constitution of the United States of America.

(2) The judgment of contempt is void because it violates the freedom of press and of speech, guaranteed by Article 1, Section 8, and Article 1, Section 19, of the Constitution of Texas.

(3) The articles, when considered in their entirety, present no clear and present danger to the overthrow of judicial impartiality or to the administration of impartial justice at the hands of a Judge possessed with a mind of reasonable fortitude, and consequently, Respondent says that said articles cannot validly be the basis for any judgment of contempt.

Wherefore, this Respondent prays that said judgment not be made final, but that same be voided; that he be dis-

charged from the rule and order of said judgment of contempt; and that the Court decree and find that he is not guilty of the charges in the information and set forth in the decree nisi; and for such other and further relief, both general and special, which he may be entitled to, and hereby prays for.

Kleberg, Eckhardt, Mobley & Roberts. By Marcellus G. Eckhardt, 510 Jones Building, Corpus [fol. 122] Christi, Texas, Attorneys for Respondent, Bob McCraken.

Duly sworn to by Bob McCracken jurat omitted in printing. (All in italics).

[File endorsement omitted]

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[fol. 123] IN THE COUNTY COURT OF NUECES COUNTY

No. 3626

In the Matter of CONWAY C. CRAIG, BOB MCCRACKEN and TOM MULVANEY

ANSWER OF RESPONDENT, TOM MULVANEY—Filed July 24, 1945

To the writ of scire facias to show cause why there should not be made final and absolute the decree nisi ordering, adjudging and decreeing that this Respondent, together with Respondents Conway C. Craig and Bob McCracken, be adjudged guilty of contempt of Court and punishing them, and each of them, "by confinement in the County Jail of Nueces County, Texas, for three days, unless they purge themselves thereof," the Respondent, Tom Mulvaney, answers as follows:

First

He says that the decree nisi is void upon its face. The information or affidavit upon which the decree is based stated no grounds upon which to found a valid order or judgment of contempt against Respondent. Any judgment of contempt so based would deprive Respondent of his liberty and freedom of speech and of the press without due process of law, guaranteed to him by the 14th Amendment to the Constitution of the United States, and by

Article 1, Section 8, of the Constitution of the State of Texas.

Second

He says that all those portions of the information and decree charging that the publications or portions of same were intended and calculated to scandalize and reflect upon the integrity of the Court and bring it into disrepute and prejudice, state no valid ground for a judgment of contempt and should, therefore, be stricken.

Third

Answering further, if required to do so, but without in any manner waiving the foregoing, this Respondent would show the following:

[fol. 124] The Status and Position Occupied in General By The Several Respondents With Respect To Newspaper Publications Of The Caller-Times Publishing Company:

A. The Caller-Times Publishing Company is a corporation duly incorporated under the laws of this State, having its principal offices and place of business in the City of Corpus Christi, County of Nueces, State of Texas. It owns and causes to be published under due and proper permit three publications, namely: (a) The Corpus Christi Caller, a morning newspaper, (b) The Corpus Christi Times, an afternoon newspaper, both of such publications being daily newspapers of general circulation in the City of Corpus Christi and County of Nueces; and (c) The Corpus Christi Caller-Times, being a Sunday newspaper of general circulation in the same City and County last mentioned.

B. Respondent, Conway C. Craig, is the Publisher of The Corpus Christi Caller, The Corpus Christi Times, and The Corpus Christi Caller-Times, and, as such, has general supervision and control over, and directs the business affairs of the corporation and its several newspaper publications. He does not edit or write editorials, newspaper stories or articles in either of the newspaper publications, nor does he, in his capacity as Publisher, supervise or direct the writing of editorials, newspaper stories or columns printed in either of the three newspaper publica-

tions here involved. Respondent Craig was acting in the capacity and status of Publisher of the several newspaper publications during all the times and occasions mentioned in the decree nisi and the accompanying affidavit.

C. Respondent, Bob McCracken, is Managing Editor of the several newspaper publications, consisting of The Corpus Christi Caller, The Corpus Christi Times, and The Corpus Christi Caller-Times. He writes the column called the "Crow's Nest" in the Corpus Christi Caller and the Corpus Christi Caller-Times. This column called the "Crow's Nest", though written for such publication by Respondent McCracken, nevertheless represents the inde- [fol. 125] pendent views, opinions and conceptions of Respondent McCracken, and does not, in any case, necessarily reflect the policy of the several newspaper publications, or of the editors, publisher and newswriters thereof. At the end of the "Crow's Nest" columns, this notation is substance and effect, appears at the foot of each publication of the column:

> "This column is written for the Caller (or the Caller-Times) by Bob McCracken. Opinions expressed are those of the writer and do not necessarily reflect the policy of this newspaper."

Respondent McCracken also writes other editorials in the several newspaper publications for which he is Managing Editor. Among other things, he also has general supervision of all newswritings and stories prepared and written by the various reporters for the three newspaper publications for which he is Managing Editor. During all of the times and occasions referred to in the decree nisi and the accompanying affidavit, he was acting in the above described capacity and status as Managing Editor of the several newspaper publications above mentioned.

D. Respondent, Tom Mulvaney, is a news writer and news reporter for each of the three newspaper publications. As such, he writes news reports and factual news narratives, including especially the news reports in connection with the trial and disposition of cases in all the State Courts holding terms in Corpus Christi, Texas, and also the United States District Court for the Southern District of Texas, when sitting in Corpus Christi, Texas. During

all of the times and occasions referred to in the decree nisi, as well as in the accompanying affidavit, he was acting in the above described capacity and status as news writer in respect to the newspaper publications last mentioned.

The Newspaper Writings And The Editorial Set Forth In The Decree Nisi As Being The Basis For The Contempt Adjudged To Have Been Committed By Respondents.

E. As a part of this Respondent's Answer, there is [fol. 126] filed herewith the following Exhibits which, though filed under separate cover, are nevertheless made as much a part of this pleading as if completely copied herein:

(a) *Exhibit C-26,* being a true and correct photostatic copy of the first page of Section B of the original publication of the Corpus Christi Caller of Saturday, May 26, 1945.

(b) *Exhibit T-26,* being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Times of Saturday, May 26, 1945.

(c) *Exhibit C-T-27,* being a true and correct photostatic copy of the first and eighth pages of the original publication of the Corpus Christi Caller-Times of Sunday, May 27th, 1945.

(d) *Exhibit C-28,* being a true and correct photostatic copy of the first and third pages of the original publication of the Corpus Christi Caller of Monday, May 28th, 1945.

(e) *Exhibit T-28,* being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Times of Monday, May 28th, 1945.

(f) *Exhibit C-29,* being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Caller of Tuesday, May 29th, 1945.

(g) *Exhibit T-29,* being a true and correct photostatic copy of the first and eighth pages of the original

publication of the Corpus Christi Times of Tuesday, May 29th, 1945.

(h) *Exhibit C-30,* being a true and correct photostatic copy of the first and eighth pages of the original publication of the Corpus Christi Caller of Wednesday, May 30th, 1945.

(i) *Exhibit T-30,* being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Times of Wednesday, May 30th, 1945.

(j) *Exhibit C-31,* being a true and correct photostatic copy of the first page of the issue of the Corpus Christi Caller of Thursday, May 31st, 1945.

[fol. 127] (k) *Exhibit T-31,* being a true and correct photostatic copy of the first and tenth pages of the issue of the Corpus Christi Times of Thursday, May 31st, 1945.

The decree nisi and the accompanying information contain only portions or partial excerpts of the news-writings and articles published in the several daily issues of the Corpus Christi Caller, the C. C. Caller-Times, and the Corpus Christi Times during the period commencing May 26th, 1945, to May 31st, 1945, both inclusive. The foregoing Exhibits contain the full, complete and correct content of such news-writings and articles, and they are made a part of this Answer so that the full meaning and purport of the articles may be obtained, not from portions or excerpts thereof, but from the full and complete context of the news stories and articles.

The editorial published in the Corpus Christi Caller, of the issue of May 30th, 1945, is likewise set forth in its entirety in Exhibit C-30 so that its meaning, intendments and effect may be adjudged from the language of the entire editorial, and not from mere portions.

(1) Exhibit A constitutes and is a true and correct transcript of all the oral testimony (in question and answer form) adduced at the trial of Cause No. 2624, styled B. M. Jackson, et al., vs. Joe L. Mayes, et al., in the County Court of Nueces County, Texas, May Term, 1945. It also contains all documentary evidence introduced at such trial, together with all objections

and rulings made upon the testimony. The Exhibit does not include colloquialisms, oral statements made by counsel, addresses made by counsel to the jury, or rulings by the Court made after the taking of testimony had been concluded. Respondent says that the true substance and effect of such colloquialisms, oral statements and addresses made by counsel and rulings and utterances made by the Court after the taking of testimony had been concluded are contained in the several newspaper items and articles in the several issues of the newspaper publications in the [fol. 128] last above mentioned Exhibits, all of which are made a part of this Answer for all intents and purposes.

Respondent Mulvaney admits that he wrote the news articles and news stories published in the issues of the C. C. Caller, the C. C. Times, and the Caller-Times, which are represented and contained in Exhibits C-26, T-26, C-T-27, C-28, T-28, C-29, T-29, C-30, T-30, and T-31, and that the excerpts of such publications set forth in the information and the decree were written by Respondent Mulvaney, but that such excerpts do not contain a full and complete context of such news articles and stories. Reference is therefore made to the last above mentioned Exhibits for full and complete context of such news articles and stories. Respondent says that in respect to Exhibit C-31, that while he did not write the same, he nevertheless *fave* the essential facts and information thereof to William Periera, a news writer for the above named publications, and that the said Periera composed and wrote the news item appearing in the C C Caller on May 31st, 1945, from the facts and information given him by Respondent Mulvaney.

G. Respondent Mulvaney denies that he wrote, assisted or took any part in the writing or composition, or that he knew about the contents prior to its publication, of the column appearing in the "Crow's Nest" in the issue of the C. C. Caller dated May 30th, 1945, which column appears in its full, complete and exact wording and content in Exhibit C-30. On the contrary, Respondent Mulvaney says that the Respondent McCracken wrote the column, and is the sole author and composer thereof; that Respondent Mulvaney had no control, supervision, or authority over the editorial policies or writings of such column called the

"Crow's Nest", and did not know of its contents or nature on the occasions and time above referred to prior to its publication.

H. Respondent Mulvaney says that the news articles and news stories published in the issues of the C. C. Caller, the C. C. Times and the Caller-Times, which are represented and contained in Exhibits C-26, T-26, C-T-27, C-28, C-29, T129, C-30, T-30, C-31 and T-31, constitute and are a fair, [fol. 129] substantially accurate and correct statement of the facts therein contained and set forth.

Fourth

The Grounds upon which General and Specific Charges of Contempt are Set Forth in the Information and Decree, and the Respondent's Answer thereto.

Answering the grounds, both general and special, upon which the Court concludes that the news articles and editorial column, in their entirety and considered together, constitute contempt on the part of Respondent Mulvaney, he makes reply as follows:

A. As to the charge: "*That the articles aforesaid, in their entirety and considered together, were calculated and intended to falsely present to the public the nature of the proceedings had . . .*"

Respondent Mulvaney denies that in writing and composing the news articles and news stories, the full context of which appears in the Exhibits herewith filed, marked C-26, T-26, C-T-27, C-28, T-28, C-29, T-29, C-30, T-30 and T-31 (as well as C'31, which latter publication contains a rewrite of the information transmitted by Respondent Mulvaney to William Periera), that he, the said Mulvaney, did calculate or intend to falsely present to the public the nature of the proceedings. On the contrary, the Respondent says that the news articles written by him are substantially correct as a matter of fact; and when compared with Exhibit A (being the transcript of all the testimony and all the documentary evidence adduced at the trial of the forcible detainer proceeding), the news articles written by Respondent Mulvaney present a fairly accurate statement of the nature of the proceedings, the issues of fact and the contentions of the parties; and Respondent says

that in the circumstances, viewing the news articles most unfavorably, they do not under any circumstances represent a calculated and intended false representation of the nature of the proceedings had in the previously referred to forcible detainer suit.

[fol. 130] In this connection, Respondent says that as a news reporter he is not charged with the duty of reporting as a news item the complete transcript of all the proceedings and all the testimony; on the contrary, in his capacity as a news writer and reporter, he attempts to report accurately and fairly (from his notes taken at the time of the trial) the pith and substance of material points and contentions made by the parties, and of the evidence adduced which would be of public interest and would inform the public of the progress of the case being tried, the import of the testimony adduced at the trial, and its proper relation and bearing upon public interest and enlightenment. Respondent says that he attempted to do this in reporting the forcible detainer suit and in writing the news articles.

B. As to the charge "*. . . that the articles . . . in their entirety and considered together were calculated and intended . . . to compel a different result on the hearing of a new trial.*" and that they "*intended and calculated to influence the Court in its ruling on the aforesaid motion for new trial, and that the said publications and circulations were made for the purpose and with the intent . . . to influence and overawe (the Court in) its deliberations in said pending cause, and were made at a time and under circumstances calculated to effect the force of justice in said proceedings . . .*"

Respondent expressly denies that:

(a) The news articles written by him were written with a calculation and intendment on his part to compel a different result on the pending hearing for new trial in the forcible detainer suit;

(b) That the articles were intended and calculated to influence the Court in its ruling on the motion for new trial;

(c) That the publications and circulations thereof were made for the purpose and with the intent to in-

fluence or over-awe the Court in respect to its deliberations on the pending cause; or,

[fol. 131] (d) That under the circumstances existing it was calculated and intended to affect the force of justice in said proceedings.

In connection with the foregoing denials, this Respondent would show that the forcible detainer suit (which was the subject of the newspaper articles) continued upon a course so extraordinary and unusual as to bring about these situations:

(a) It developed controversial issues of fact which, though entirely collateral and at times wholly foreign to the determinant fact issues of the case, were nevertheless developed and were especially pursued by the Honorable Joe D. Browning in his inquisition of the witness Burchard; that is to say, the controverted issues of fact in respect to: (1) the operation of lotteries and slot machines and the conducting of gambling, poker games and gambling places by one of the interested witnesses; (2) the loss by Burchard of several auditing and bookkeeping accounts because of the influence asserted by him in his testimony to have been exercised upon such customers by one of the witnesses in the case, who was also an interested party in the outcome of the litigation.

(b) It precipitated an adamant and persistant refusal on the part of the members of the jury to obey and comply with the peremptory instructions of the Court to find for the Plaintiffs—the jury refusing for more than 15 hours to obey the instructions of the Court to find for the Plaintiffs because it was against the conscience of the jury to do so, as asserted by several of its members; and the final obedience of the jury to the Court's instructions coming only after one of the counsel for the Defendants had been permitted, without objection of the Court, to make a short address to the jury, advising its members that it would be futile to hold out longer, since under the law they were obliged to adhere to the Court's ruling, though the dictates of their conscience might be against doing so.

[fol. 132] (c) Though being a forcible detainer suit originating in the Justice Court, and being then on

appeal from that Court to the County Court where it was tried, it presented a bitter and hard fought case conducted by two competent, prominent and high ranking trial lawyers at the bar, namely, the Honorable B. D. Tarlton, for Plaintiffs, and the Honorable Walter M. Lewright, for Defendants, who each assumed the lead in the case. The case created considerable interest among the members of the bar, as well as laymen, and the Court sessions were well attended by the public.

(d) It provoked from the Honorable Joe D. Browning, Judge of the County Court, this most unusual accusative admonition in respect to the writing and publication of the news stories by Respondent Mulvaney, the remonstrances from Judge Browning being made under the following circumstances and colloquy between the parties: On Sunday morning, May 27th, 1945, at about 9 A. M., Judge Browning called in the jury, which he had ordered locked in the jury room after that body had thrice refused to sign the instructed verdict to find for the Plaintiffs, and thereupon asked the jury if the instructed verdict had been signed, to which the Foreman replied in the negative. Judge Browning thereupon advised the jury that he would convene Court at 9 A. M. Monday morning, May 28th, followed by words to the effect that he would await the signing of the verdict until such time as the jury brought it in. At that time, Walter M. Lewright, counsel for Defendant Mayes (against whom the instructed verdict had been given) made an address to the jurors, a substantially correct text of which is to be found in the issue of the C. C. Caller of Monday, May 28th (Exhibit C-28). In effect, he urged the jurors to go back to the jury room and sign the verdict. The jurors then filed out and immediately after the last juror had left the Court room, Judge Browning spoke, in substance and effect, [fol. 133] these words before the assembly of lawyers, this Respondent and Miss Marie Kelly Young, Judge Browning's Clerk and Secretary:

> "I want this newspaper man who has been putting all this stuff about the trial (referring to the forcible detainer suit) in the paper to put this in also: that he came to me last night and said I was going to lose because (or on account) of this case,"

meaning that he would lose his office at the next election for County Judge. While speaking, Judge Browning pointed to Respondent Mulvaney, whereupon Mulvaney arose and denied that he had made any such statement, and demanded proof of when and where such a statement had been made. To this request Judge Browning answered in words to this effect:

"Oh, you know where—out there last night." To this statement by the Judge Respondent Mulvaney replied in words to this effect:

"Judge, you must know that I made no such statement to you last night, or any other time. I am too long in this business ever to make such an injudicious and fool statement, and the only thing I said to you that was remotely close to what you have quoted was, after the jury had twice refused to sign the verdict, I remarked to you: 'Judge, it looks as though you have lost six good men and true.'"

Respondent Mulvaney then again denied before the entire group that he had made such a statement, and requested a retraction and also requested the attorneys present to witness that he had not made the statement which the Judge had attributed to him. At this point Miss Marie Kelly Young stood up and made this statement, in substance and effect:

"Why, Judge, that was Mr. Woods (referring to associate counsel LeGrand Woods for Defendant Mayes) who said that to you last night."

[fol. 134] Whereupon the attorneys affirmed their belief that no such statement was made by Respondent Mulvaney. Judge Browning thereupon said, in words to this effect:

"Aw, skip it, skip it."

Respondent says that because of the unusual circumstances above set forth, the forcible detainer suit kindled public interest and placed upon the forum of public opinion the entire matter, thereby stimulating and inviting public discussions and criticism with respect to the collateral matters, such as gambling, threatening witnesses and measuring the political fate of the Honorable Joe D. Browning.

Respondent says that the latitude and scope of fair and legitimate discussion of the pending trial was not only broadened and opened into wide avenues, but there was justly invited criticisms and discussion as a matter of public interest. This Respondent further says that the news articles written and composed by this Respondent, when the complete context is considered, cannot be construed to be (and was not) a clear and present danger to the orderly and fair administration of justice, or to the preservation of judicial impartiality at the hands of a Judge possessed of a mind of reasonable fortitude. This Respondent further says that to regard the news articles as being a substantial influence upon the course of justice "would be to impute to judges (including Judge Browning) a lack of firmness, wisdom or honor," which this Respondent refuses to accept as a major premise, and is unfounded.

C. As to the charge that the articles "*falsely stated that Mayes was an ex-insurance man, when in truth and in fact his principal business during the time the said cause was pending was and is the insurance business.*"

This Respondent denies that he falsely stated that Mayes was an ex-insurance man, or that he willfully intended to do so. In this connection, and as a basis for his interpretation that Mayes could be described as an ex-insurance man, Respondent would show: the undisputed testimony in the forcible detainer suit against Mayes showed Mayes to have [fol. 135] been inducted into the United States armed forces on January 17, 1945, and that he was at the time of the trial in the United States Army. While testifying in the forcible detainer suit, Mayes was asked these questions, and gave the following answers:

"Q. Prior to your departure from Corpus Christi what business were you in?

"A. I own this business, and I am also in the general insurance business.

"Q. You owned what business?

"A. Joe L. Mayes Insurance Agency, which is an insurance business."

From the foregoing testimony, Respondent says that it might be fairly interpreted that Mayes was an ex-insurance man in the sense that he was not now actively engaged

in his personal and individual capacity of selling insurance, though he may have owned an interest in the general insurance agency. In all events, this Respondent says the distinction is unimportant and is upon an immaterial collateral issue; that it could not serve as a coercive influence presenting clear and present danger so as to actually threaten the outcome of the trial by overthrowing judicial impartiality. Even if the statement were not strictly accurate (which this Respondent denies), it cannot and does not in the circumstances amount to an act of contempt of court as that term is understood and comprehended under the law of the land.

D. As to the charge *"That said articles and all of them failed to state the terms of the contract declared on by Plaintiffs; they failed to state that the check which the Defendant Burchard testified he had proffered was tendered seven days late, and that the said check was post-dated thirty days from the date tendered, and would not, in consequence, be considered a legal tender of rent money."*

[fol. 136] (a) Respondent denies that the news articles failed to state the material portions of the contract necessary to an understanding of the determinant issues in the case, viz:

(1) Whether the so-called option clause in the contract extending its duration for another year upon payment of $275.00 per month, instead of $250.00 per month theretofore provided, had the effect of terminating the contract in the event the proper tender was not made; and

(2) Whether the so-called option in the contract to thus extend the lease for a year had been timely and *properly* exercised in contemplation of law by the Defendant Mayes, acting through his attorney-in-fact, Burchard.

In this connection, Respondent says that the issue of the C. C. Caller-Times of Sunday, May 27th, 1945 (Exhibit C-T-27), and the issue of the C. C. Caller of May 30th, 1945 (Exhibit C-30), when considered together, succinctly state the essential terms of the contract reflecting upon the option clause and the

acts done and performed by the Defendant Mayes in the attempt to exercise the option; and reference is here made to such Exhibits.

(b) Respondent would show that the articles made clear that the check of $275.00 was tendered "later", meaning subsequent to March 15th, the date the contract was terminated (see Exhibit C-30); and that on March 19th, when it was called to the attention of Burchard, as attorney-in-fact for Mayes, that the lease contract had expired, he, Burchard, had offered to pay the difference between the $250.00 check previously delivered to Plaintiffs on March 15th (which was then in possession of the Plaintiffs), and the required $275.00, that same was refused. Moreover, the news articles complained of show, when considered as a whole, that the Plaintiffs concluded that the contract was terminated on March 15th, and consequently, that they would accept no checks or legal tender or any [fol. 137] character after that date, since Plaintiffs desired to avail themselves of their legal right to terminate the lease contract, which they contended expired on March 15th, for want of proper payment at that time of the $275.00 monthly installment. Respondent says that while it is true the news articles did not state that the $275.00 check tendered by Burchard was post-dated, that such omission was immaterial and unimportant in view of the Plaintiffs' position last above stated.

E. Answering further in regard to the various charges that "th said articles" contained certain designated omission referred to in the last paragraph of Page 5, of the Information, and on the corresponding page and paragraph of the Decree, this Respondent says as follows:

(a) Respondent expressly denies that the articles omited much material evidence that would have enabled the public generally to form a fair estimate of the real nature of the controversy.

(b) In this connection, Respondent says that the context of the publications, when considered together, clearly show that it was the main and paramount contention of Plaintiffs that the lease with Mayes had

expired by its own terms on March 15th, 1945, because of the failure of Defendant to pay to Plaintiffs on such date the sum of $275.00; and that no payment subsequently tendered would prolong or extend the lease, especially when refused by Plaintiffs, as in this case. Respondent says that from the context of the news articles, when considered as a whole, it was clearly evident to those reading the news items and articles that this legal contention served as Plaintiffs' real basis for the bringing of the suit, the asking for an instructed verdict and entry of judgment for Plaintiffs; in short, it served as the controlling basis of recovery for all relief sought and obtained by Plaintiffs; and Respondent, therefore, denies that the articles failed to state the grounds of the motion for [fol. 138] instructed verdict, when the controlling ground for Plaintiffs' recovery was obvious and oft repeated in the said news articles.

(c) Respondent denies that the reference to the motion as being a "one page motion" was in any manner derogatory or could serve as the valid basis for any act of contempt as against Respondent.

(d) As to the charge that the articles failed to state "that the arrangements under which the premises were operated had been in existence for some months before Defendant Mayes was inducted in the Army," this Respondent says that such omission, if omission it was, was not deliberate or for the purpose of misleading; was immaterial, unimportant, and was not regarded by Respondent as worthy of mention.

(e) Respondent says that it is true that the news articles or editorial column failed to mention that Franklin Flato, Fred Flato, Lt. Robert Flato and Dr. Harry G. Heaney were joint owners with Bush M. Jackson of premises leased to Defendant Mayes, and that all such owners were actually Plaintiffs and highly respected citizens; but in this connection, Respondent would show the following: The lease was signed by Bush M. Jackson, as agent for all the Lessor owners of the premises leased to Mayes; that Bush M. Jackson testified to his joint ownership of the leased premises, and that suit was brought in behalf of

all owners, though none of the other owners appeared in person to testify or take an active part in the case. Moreover, the transcript of the proceedings in the forcible detainer suit show that all acts, dealings and transactions with reference to the making of the lease were handled exclusively by Bush M. Jackson, as agent, and that he was manager of the building, and in fact was active in instituting and prosecuting the suit in the interest of all concerned. The newspaper accounts were, in this respect, the natural result of [fol. 139] the way in which the trial was conducted.

F. Respondent denies that the news articles written by him *needlessly* repeated and emphasized the fact that the Defendant Mayes was in the armed service; moreover, Respondent says that even if the charge were true, which is denied, it serves as no valid basis for a charge of contempt.

G. Respondent denies that the news articles needlessly and without cause repeated, reiterated and over-emphasized the fact that no argument was heard on Plaintiffs' motion for instructed verdict; and Respondent says that due and sufficient prominence was given in the issue of the C. C. Caller-Times (Exhibit C-T-27, at Page 8) of the fact that Defendants' motion for an instructed verdict was argued by Defendants' counsel at length, and that a ruling on the motion was withheld until all evidence was in.

H. Respondent says that the failure to state in the news articles that the jury had no right to conclude "what the law might be upon the proof or any given set of facts, but that they were duty bound to receive the law from the Court," and that "the Court was under no duty to hear arguments or the citation of authorities from either party," constitutes no valid ground or cause upon which contempt charges may be lodged or sustained against this Respondent. In this connection, Respondent says he is not a lawyer, nor one learned in the law and legal procedure, and, therefore, did not and could not state in his newspaper articles what the Judge himself failed to make plain to the members of the jury in respect to the legal basis of their duty to receive the law from the Court when the Court had concluded that the case should be decided as a matter of law upon the facts adduced at the trial.

I. Respondent expressly denies that the news articles written by him and published in the several issues of the newspaper publications could reasonably be construed as meaning, or as intended to inform the reading public, "that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly [fol. 140] deprive a patriotic citizen, unable because of his service to his country, to defend himself of his rights in and to valuable property, and that counsel for Plaintiffs, and the *Court* aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose," and Respondent denies that "the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful."

Respondent says that any fair reading of the articles will not produce any such meaning as is charged, and that there is no factual basis in the articles to support such charges made against Respondent.

J. Respondent denies that the articles, however viewed, were intended and calculated to reflect upon the integrity of the Court, or bring it into disrepute and prejudice, or that the said publications and circulations were made for the purpose and intent of scandalizing the Court. In this connection, Respondent says that under the law of the land, the writing and preparation of said articles cannot serve as a valid basis for the punishment for contempt of Court; and this Respondent says that they cannot serve as any predicate for valid charges of contempt.

Premises Considered, Respondent says:

(1) That the judgment of contempt is void because it clearly violates the freedom of press and of speech guaranteed by the Fourteenth and Fifth Amendments to the Constitution of the United States of America.

(2) The judgment of contempt is void because it violates the freedom of press and of speech granted by Articles 4, Section 8, and Article I, Sec. 19, of the Constitution of Texas.

(3) The articles, when considered in their entirety, present no clear and present danger to the overthrow

of judicial impartiality or to the administration of [fol. 141] impartial justice at the hands of a Judge possessed with a mind of reasonable fortitude, and consequently, Respondent says that said articles cannot validly be the basis for any judgment of contempt.

Wherefore, this Respondent prays that said judgment not be made final, but that same be *vlided;* that he be discharged from the rule and order of said judgment of contempt; and that the Court decree and find that he is not guilty of the charges in the information set forth in the decree nisi; and for such other and further relief, both general and special, which he may be entitled to, and hereby prays for.

Kleberg, Eckhardt, Mobley & Roberts By: Marcellus G. Eckhardt, 510 Jones Building, Corpus Christi, Texas, Attorneys for Respondent, Tom Mulvaney.

*Duly sworn to by Tom Mulvaney, jurat omitted in printing.*

[fol. 142] [File endorsement omitted.]

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[fol. 143] IN THE COUNTY COURT OF NUECES COUNTY

No. 3626

In the Matter of CONWAY C. CRAIG, BOB MCCRACKEN, and TOM MULVANY

FINAL JUDGMENT—Filed August 3, 1945

This day this cause was regularly called for trial, the said cause coming out of an information verified and filed by an officer of this Court, the said information charging Conway C. Craig, Bob McCracken, and Tom Mulvany all residents of the County of Nueces, with constructive criminal contempt of this Court, by virtue of having written, published and circulated, and caused to be written, published and circulated, in the City of Corpus Christi, where this Court was sitting, and in the County of Nueces, within the jurisdiction of this Court, certain newspaper reports and an editorial, having for their subject matter the pro-

ceedings in a cause then pending in this Court for trial and adjudication, the said reports and editorial being intended and calculated to reflect upon the integrity of this Court, and being it into disrepute and prejudice and influence the Court in its rulings on the aforesaid cause, and that the publication and circulation were made with the intent and for the purpose of scandalizing the Court and were intended to influence or overawe its deliverations in such pending cause, and that they were made at a time and under circumstances calculated to affect the force of justice in said proceeding, and were so calculated and intended to do; to which charges in said information contained, the respondents, Conway C. Craig, Bob McCracken and Tom Mulvany, after having been duly summonsed by writ of *Scire Facias* to appear before this Court and show cause if any they had, why a decree nici, adjudging them in contempt of Court and assessing the punishment of each of them at imprisonment in the County Jail of Nueces Couty for three days, unless they purged themselves of the said contempt, should not be made final and absolute, duly filed their written and verified responses denying the charges in said information contained, and [fol. 144] the State appeared by her Special Assistant County Attorney *ad litem*, and the respondents, Conway C. Craig, Bob McCracken and Tom Mulvany appeared in person, their counsel also being present, and each of the parties announced ready for trial. Whereupon counsel for the respondents urged in behalf of each of them their demurrers to the information aforesaid, being the first and second sections of their several responses, and the Court, after having considered the said demurrers, overruled them, to which ruling of the Court counsel for the respondents, and each of them, then and there excepted. Whereupon counsel for all parties agreed and stipulated *the* certain facts material to the proper adjudication of this cause were undisputed, and the said agreement and stipulation having been reduced to writing and signed by counsel for both parties, it was approved by the Court and ordered filed as part of the record in this cause. Whereupon, the Court having heard the evidence and the observations of counsel, and having considered the information, the responses thereto, the stipulations of the parties, and all the evidence and the remarks of counsel made herein, now finds the following:

1. That from the 10th day of May, 1945, until the 9th day of June, 1945, there was pending before this Court for trial and adjudication, a certain cause numbered 3624; and titled B. M. Jackson, et al. vs. Joe L. Mayes, et al., and that this Court had jurisdiction of said cause.

2. That while said cause numbered 3624 was pending before this Court, there were written, published and circulated in the Corpus Christi Caller for May 26th, 1945, the Corpus Christi Times for May 26th, 1945, the Corpus Christi Caller-Times for May 27th, 1945, the Corpus Christi Caller for May 28th, 1945, the Corpus Christi Times for May 28th, 1945, the Corpus Christi Caller for May 29th, 1945, the Corpus Christi Times for May 29th, 1945, the Corpus Christi Caller for May 30th, 1945, the Corpus Christi Times for May 30th, 1945, and the Corpus Christi Caller for May 31st, 1945, the news reports and editorial from which the excerpts set forth in the information herein were taken, [fol. 145] and that the Corpus Christi Caller is a daily morning newspaper published and generally circulated in the County of Nueces and within the jurisdiction of this Court, and that the Corpus Christi Times is an afternoon daily newspaper published and generally circulated in the County of Nueces and within the jurisdiction of this Court, and that the Corpus Christi Caller-Times is a Sunday morning newspaper published and generally circulated in the County of Nueces and within the jurisdiction of this Court; and that these newspapers are generally circulated and sold throughout the city of Corpus Christi and in and around the Courthouse for Nueces County, and were so circulated and sold throughout the pendency of said cause No. 3624, and that the said newspapers are caused to be published by the Caller-Times Publishing Company, a corporation, and that the said reports and editorial, considered in their entirety, by reason of inaccuracies contained therein, material matters omitted therefrom, emphasis on matters of evidence adduced at the trial of Cause No. 3624, and the inclusion in said articles and editorial of matters foreign to the record in said cause, were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in cause No. 5995, to coerce and compel a judgment contrary to the law and the evidence in said

Cause No. *5095* and to block the administration of justice, and that the said news reports and editorial were intended so to do.

3. That the said respondent, Tom Mulvany, is a news writer and news reporter for the three newspaper publications aforesaid, and in his capacity as such, wrote or caused to be written all of the news reports above referred to, and that the said Mulvany willfully and knowingly wrote or caused to be written the said newspaper articles in a manner calculated and intended to reflect upon the integrity of this Court to affect the course of justice and the rights of litigants in Cause No. *5095*, to coerce and compel a judgment contrary to the law and the evidence in said Cause No. *5095*, and to block the administration of justice [fol. 146] and that the respondent, Mulvany, could have and should have written or caused to be written the news reports aforesaid in a manner calculated not to have the effect hereinabove mentioned.

4. That the respondent, Bob McCracken, is the Managing Editor of the three newspaper publications aforesaid, and the author of the editorial hereinabove referred to, and that as Managing Editor, he has and did have on the dates the publications aforesaid were made, supervision of the editorial departments of the three newspaper publications aforesaid, with the authority and the duty to exclude from publication in said three newspapers any newspaper article or editorial inimical to the best interests of the said newspapers, or of a nature calculated to block the administration of justice, in any cause pending in any Court in Nueces County, Texas. That the said editorial written by the respondent, McCracken, was of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in Cause No. *5095*, to coerce and compel a judgment contrary to the law and the evidence in said Cause No. *5095*, and to block the administration of justice, and that the said editorial was intended so to do; and that the said respondent, McCracken, in his capacity as Managing Editor, wholly failed to perform his duty and exclude from publication in the three newspapers aforesaid, the news reports hereinabove referred to, and that the said respondent, McCracken, permitted or directed and permitted the

said news reports to be given undue prominence and display in the newspapers aforesaid.

5. That the respondent, Conway C. Craig, is and was on the dates of the publications hereinabove referred to, the president of the corporation, Caller-Times Publishing Company, and a stockholder therein, and publisher of the three newspaper publications hereinabove mentioned, and that in those capacities, the said respondent, Craig, had the au- [fols. 147-148] thority and the duty to exclude from publication in said three newspapers any newspaper article or editorial inimical to the best interests of the said newspapers or of a nature calculated to block the administration of justice in any cause pending in any Court in Nueces County, Texas. That the said respondent, Craig was aware of the contents and natures of the articles and editorial published, and that he knowingly and willfully, in dereliction of his duty aforesaid, failed and refused to exclude the said news reports and editorial from the said publications, but on the contrary knowingly and willfully permitted them to be published and given undue prominence in the three newspapers aforesaid.

And the Court having considered the foregoing, is of the opinion that the respondents, Conway C. Craig, Bob McCracken and Tom Mulvany, and each of them, should be adjudged in contempt of this Court, and they are hereby so adjudged; and the punishment of each of them is hereby assessed at imprisonment in the County Jail for three days, and a *capias* will issue after this judgment has been spread upon the minutes of this Court, commanding the Sheriff of Nueces County to arrest the said respondents, Conway C. Craig, Bob McCracken and Tom Mulvany, and place them in jail in the County Jail of Nueces County, Texas, and there safely keep them imprisoned for the full period of three days from date hereof; and it is further ordered that the respondents, Conway C. Craig, Bob McCracken and Tom Mulvany pay all costs of proceedings had herein, for which costs let execution issue.

Signed, this the 3rd day of August, A. D. 1945.
(Signed) Joe D. Browning, Judge of the County Court of Nueces County, Texas.

[fols. 149-150] IN THE COUNTY COURT OF NUECES COUNTY

No. 3626

In the Matter of CONWAY C. CRAIG, BOB MCCRACKEN and TOM MULVANY

Reporters' Transcript of Evidence

APPEARANCES:

Jerry D'Unger, Esq., Special Assistant County Attorney, Nueces County, Texas, appointed by the Court to represent the State of Texas.

M. G. Eckhardt, Esq., Corpus Christi, Texas, Attorney for Respondents.

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[fol. 151] CONWAY C. CRAIG, called as a witness by the State, first having been duly sworn, testified as follows:

Direct examination.

By Mr. D'Unger:

Q. State your name, please?

A. Conway Craig.

Q. Mr. Craig, you are one of the respondents in this proceedings, are you not?

A. Yes, sir.

Q. You understand that this proceeding is in the nature of a criminal proceeding and that the rules of criminal procedure apply and that under our constitution in a proceeding of this sort you may not be compelled to answer any question if that question would incriminate you in any manner. Do you wish to claim that constitutional immunity or waive it at this time?

A. Waive it.

Q. Mr. Craig, it has been stipulated here that you are at this time and were during the month of May and to date the publisher of the Corpus Christi Caller, the Corpus Christi Times and the Corpus Christi Caller-Times. It has also been stipulated that you were at that time in control and exercising supervision over the business affairs of those newspapers. Would you be so kind as to explain what the business affairs of those three newspapers are, generally?

A. We sell advertising. We have circulation and of course you have your department heads; your department heads have charge of the departments. I have supervision over them.

Q. Just a moment. You say you have department heads. Who are your department heads and what departments are they in charge of?

[fol. 152] A. Well Gilbert Vetters is advertising; L. E. McNeal is circulation; Mr. Breese is mechanical superintendent; Mr. — is foreman of the composing room, and Bob McCracken is managing editor of the three papers. Bob Jackson is editor of the three papers.

Q. You state you have supervision over the heads of the departments?

A. Yes.

Q. Your answer is you do have?

A. Yes.

Q. I will ask you, Mr. Craig, specifically whether or not you have control of the editorial department and the control and supervision over that department?

A. Well, I suppose that if it came to a matter of policy of the paper say I would have the right to have some supervision over it, but as a practical matter that is what they are supposed to do.

Q. To whom do you refer when you mention them?

A. I am referring to the people you asked about in your last question.

Q. Referring to Mr. McCracken and Mr. Jackson?

A. In the editorial department.

Q. Mr. McCracken and Mr. Jackson in the editorial department, and in forming the editorial policy to whom are they responsible?

A. Well, they are responsible to themselves and to me.

Q. And to you?

A. Yes.

Q. Would you have the authority to exclude any given story or editorial if you felt that it would be inimical to the best interests of the paper?

A. I suppose so as publisher of the paper but an occasion such as that has never arisen, however.

Q. These papers are owned by a corporation, are they not?

A. Yes.

Q. I will ask you whether or not you are a stockholder in that corporation?

[fol. 153] A. Yes.

Q. Are you an officer in the corporation?

A. Yes.

Q. What office do you hold in the corporation?

A. President.

Q. You are president of the corporation. I will ask you whether or not Mr. Jackson or Mr. McCracken or Mr. Mulvany hold any stock in that corporation?

A. Yes, two of them do.

Q. Which two is that?

A. McCracken and Jackson.

Q. Do they hold any office in the corporation?

A. No.

Q. Mr. Craig, I will ask you whether or not you read the news articles and editorials complained of in the information contained in the citation of which you men——

Mr. Eckhardt: That has been stipulated. I don't see any purpose in reiterating it.

Mr. D'Unger: It has been stipulated, but it has not been stipulated as to when the respondent read the articles. That is what I am asking. That is in point of time.

Mr. Eckhardt: It is stipulated he read them after the publication. If he wants to ask how long after publication I don't object.

Q. It has been stipulated you did read all of these stories and editorials after they were written, after they were published. How long after they were published did you read them?

A. That would be impossible to say, Jerry, because——

Q. Well, approximately?

A. Well, — read the morning paper sometime during the morning of the day after it was published and the evening paper that night after I had gone home. I couldn't say what time I read any story with dozens of them there you have there.

Q. I understand that. I'm not trying to elicit the exact moment.

[fol. 154] A. Yes.

Q. But I want to get into the record an approximation of how long after these stories were published did you read

them. Would you say you had read each story within twelve hours after it was published?

A. I imagine so.

Q. The first of these, the first of the articles complained of—the first of the articles complained of was published in the Caller for the morning of May 26. Did you read that article?

A. I suppose I did. I don't remember what the article was.

Mr. Eckhardt: We object to that. I think in the conservation of time we should observe the stipulations.

Mr. D'Unger: I will withdraw the question.

Q. The last article complained of was published on the 31st in the Caller. I hand you an exhibit attached to the stipulations and identified as T-26. The story concerning this matter is found at the top of the front page under the headline "Testimony Gets Underway in Ouster Suit".

Mr. Eckhardt: Exhibit T-26?

Mr. D'Unger: T-26.

Q. Isn't that a rather prominent display of a news story, Mr. Craig?

A. No, I shouldn't think so. It isn't as prominent as ma-y others on that page.

Q. What other story is more prominently displayed than that one?

A. Well, what do you want — to do? Read it to you?

Q. Well, just mention them?

A. Well, here is The Encirclement of Japs in Luzon; Army says Nineteen Superforts in Raid; Hoover Invited to White House to Discuss Food Situation.

Q. I will ask you whether or not there is any other local story given that prominence on that front page?

A. Here is one under almost the same size heading; Navy Approves Construction Job at Kingsville.

[fol. 155] Q. That is located considerably lower on the page than the story on this suit, isn't it?

A. Yes.

Q. I hand you herewith an exhibit attached to the stipulations and identified as CT-27. I will ask you to locate the story dealing with this matter?

A. There it is.

Q. Will you describe that head, please?

A. Two column, three line head.

Q. I will ask you what other story has been given the same prominence on the front page of this Sunday paper? This story deals with this Mayes ouster suit?

A. Yes.

Mr. Eckhardt: I think the exhibit speaks for itself. That is a question of relevancy.

Mr. D'Unger: What I am leading up to is this: I want to have Mr. Craig as publisher of this paper, a newspaper man of considerable experience, I want him to explain why this particular matter was given the prominence it was.

Mr. Eckhardt: The matter speaks for itself. That is his conclusion. The publication is here in evidence, but he can ask about where it apears, what this says, what type that is, but to judge between the two is the matter this witness is——

Mr. D'Unger: That point is——

Mr. Eckhardt: Oh, I will waive it to get through.

Q. Isn't it true that the only story that is more prominently displayed on the front page of that paper is that story which is bannered, "Enemy says B-29s make Tokyo a Shambles"?

A. That is a matter of opinion. Here is a four column head down here at the bottom of the page. In other words, that is determined by the editors of the paper, what they [fol. 156] think more people are interested in, what is the most interesting and that happens to be the most interesting local stroy that come out that issue.

Q. Why was it the most interesting story that came out in that issue?

A. Because it had more local interest; more people were interested in the case because——

Q. How do you know there were more people interested in the case?

A. Well, in other words, that was the opinion of our editors. In other words, I don't edit the paper.

Q. But you do have control of the editorial department?

A. I have control of the editorial department in setting policies.

Q. Had you during the day—could you have directed the editor to play this story down had it been submitted to you before publication?

A. I could have.

Q. You could have, but you didn't?

A. No, why should I? It wasn't given any more prominence than some other court cases we have.

Q. How long have you been associated with the Caller-Times?

A. Oh, for about *about* seventeen years.

Q. About seventeen years. Do you recall any other instance where proceedings had in a forcible entry and detainer suit were ever reported on the front page of any of the three newspapers owned by the Caller-Times Publishing Company?

A. I imagine there has been.

Q. I am not asking you to imagine. I am asking you if you can recall any given instance?

A. What do you mean by the suit you are referring to. I don't understand your legal term.

Q. I am asking you if you can tell me of any other case of this nature that was has ever been *ever been* reported on the front page of any of the three papers published by [fol. 157] the Caller-Times Publishing Company during your seventeen years association with the company?

A. Any other story given as much prominence?

Q. Any other story concerning a forcible entry and detainer suit, a suit of this kind?

A. I don't know of any other suit exactly like this we have had here. We have never been sued before in the same way we are now.

Q. I mean the suit that has come to be popularly known as the Mayes case. Do you ever recall any suit similar to the Mayes case having been published and publicised on the front page of any of these three papers?

A. I can't answer; no, I can't answer.

Q. Mr. Craig, I will ask you whether or not you know Franklin Flato?

A. Yes, sir.

Q. Who is Franklin Flato?

A. He is manager of the Nueces Hardware Company.

Q. Do you know Frederick Flato?

A. Yes.

Q. Who is Frederick Flato?

A. Franklin's brother.

Q. Does he have any prominence here in the community?

A. Well, he is a son of Edwin Flato, who is quite prominent.

Q. Who is Robert Flato?

A. That is the younger brother of Franklin, I believe.

Q. What businesses, if any, do they operate here?

A. They operate the Nueces Hardware Company and Corpus Christi Hardware Company.

Q. And I will ask you whether or not those business are large or small businesses?

A. They are large.

Q. I will ask you whether or not the Corpus Christi Hardware Company and the Nueces Hardware Company [fol. 158] have been sizeable buyers of advertising in the three papers published by the Caller-Times Publishing Company?

Mr. Eckhardt: What is the relevancy.

Mr. D'Unger: What I am trying to show——

The Court: What are you trying to show?

Mr. D'Unger: I am trying to determine the reason for the omission of the names of these parties as plaintiffs in the case styled B. M. Jackson, et al., vs. J. M. Mayes, et al.

Mr. Eckhardt: We will withdraw the objection. Go ahead.

Q. Have these people as owners and operators of these hardware businesses been buyers of advertising of the three papers published by the Caller-Times Publishing Company?

A. Well, the Nueces Hardware has.

Q. It has been a pretty good size account?

A. Yes.

Mr. Eckhardt: That is not Franklin Flato or any of the rest. It is a corporation.

Mr. D'Unger: He has testified that Franklin Flato is manager.

A. I may be in error. That is what I think.

Mr. Eckhardt: Let him go ahead. We will get along faster.

Mr. D'Unger: We will withdraw the question.

Q. Do you know Dr. Harry G. Heaney?

A. Yes, sir.

Q. Who is Dr. Harry G. Heaney?

A. He is a physician here in Corpus Christi.

Q. You didn't know—Mr. Craig, who employs the editors and reporters for the Caller-Times Publishing Company?

A. Mr. Jackson.

Q. Do you have any authority or control over the hiring and discharge of reporters and editors?

[fol. 159] A. No, Mr. Jackson——

Q. Do you mean you don't have any or leave the matter entirely to him?

A. The matter is left entirely to him.

Q. Could you exercise any control over the matter if you were so minded?

A. Well, I might.

Q. Well, I will ask you whether or not you could?

A. What do you mean by that?

Q. I mean by that if you were not satisfied with Mr. Jackson's selection of personnel for his editorial staff you could refuse to employ them or if you were not satisfied with their performance after their employment you could compel him to discharge them?

A. Well, he has charge, he and Mr. McCracken have complete charge of the editorial department. The hiring or firing of anybody, it is up to them.

Q. But you have supervision over them, is that right?

A. Yes.

Q. I will ask you whether or not as publisher of the three papers published by the Caller-Times Publishing Company you could exclude a libellous story?

Mr. Eckhardt: That is immaterial. We are not trying these men for libel. This is a contempt matter.

Mr. D'Unger: That is entirely true. That is a——

Mr. Eckhardt: Let me finish. We think this is an attempt to inject in this case a matter of libel. Certainly it can't be a determinant issue in this case with respect to this——

Mr. D'Unger: That is no question of libel here. This question is asked to determine the scope of Mr. Craig's authority in an effort to be able to determine what duty in this respect he may possess.

[fol. 160] The Court: Read the question.

(Question was read by the Court Reporter.)

The Court: Objection sustained.

Q. I will ask you whether or not, Mr. Craig, as publisher of the three papers published by the Caller-Times Publishing Company you could exclude a news story or an editorial calculated to obstruct the administration of justice?

Mr. Eckhardt: If it did, if the story did do that.

Q. I will add to that, if in your opinion it was calculated to block the administration of justice?

A. Well, I couldn't because that is a job of the editors of the papers *of the paper*. I might discuss it with them if I knew about it in advance, but their opinion——

Q. I am not asking you what you did.

Mr. Eckhardt: Let him finish.

Mr. D'Unger: All right.

Mr. Eckhardt: Go ahead and answer the question.

Mr. D'Unger: If the Court please, the answer is not responsive to the question. He said he wouldn't. I asked him whether or not he could.

Mr. Eckhardt: Let him answer.

Mr. D'Unger: Go ahead and answer it.

A. Well, as I say, we have the editors on the papers that are responsible for the editorial policy of the paper and the only part I take in any editorial matter would be to help to set the policies of the paper, and not directing them as to what should be run or should not be run because they know more about that than I do.

Q. And they are responsible to you, is that correct?

A. In what way?

Q. As editors and reporters?

A. The editors are responsible to me.

Q. And the reporters are responsible——

[fol. 161] A. Are responsible to the editors.

Q. I will ask you in connection with these stories and the editorial complained of in the information, whether you did or did not exercise your power of supervision?

A. No.

Mr. D'Unger: That is all.

Cross-examination.

By Mr. Eckhardt:

Q. Mr. Craig, I direct your attention to the point that Mr. D'Unger was attempting to bring out in respect to the prominence of those stories. It is in evidence in Exhibit A that many controversial issues of fact were offered relating

to lotteries and slot machines, and conducting gambling and poker games as brought out by Mr. Burchard of one——

Mr. D'Unger: I would like for counsel to quote those matters and not just a general reference to the record in that cause.

Mr. Eckhardt: If you want me to do that, it will take considerable time to read it. I thought I would shorten this thing. I think it is sufficient. It is in substance a statement of what the controversial statements are. If he wants——

Mr. D'Unger: In the interest of time I will withdraw it.

Mr. Eckhardt: All right. All right. In addition to that it has been stipulated that the jury thrice refused to return an instructed verdict which the Judge had instructed them to return—that is in the stipulations—because they stated it was against their conscience. In addition it is stipulated that on the morning of May 27th, Sunday morning, about 9:30 A. M., the judge Browning spoke in substance and effect these words, before the lawyers, B. D. Tarlton, Walter Lewright, and LeGrand Woods, and Miss Marie Kelly Young, Deputy Clerk, "Now, I want the newspaper [fol. 162] man who has been writing all these stories in the newspapers to put this in: That he told me out there last night that I was committing political suicide——"

Mr. D'Unger: Before the witness answers that question I would like to ask one question on voir dire.

Mr. Eckhardt: I would like to finish this question. Go ahead.

Mr. D'Unger: Where did you get your knowledge of the Mayes case, Mr. Craig?

A. From the news articles.

Mr. D'Unger: If Your Honor please, we submit he isn't qualified to answer that question. He has no record on the matter.

Mr. Eckhardt: I am going to submit the question and if it is overruled that is another contingency.

Q. • • • "when I granted the motion for instructed verdict," or words to that effect. While speaking, Judge Browning indicated that he meant the respondent Mulvany. Whereupon Mulvany arose and denied that he had made any such statement, and requested of the Judge when and where such a statement had been made. To this request, Judge Browning answered: "Oh, you know where—out

there last night." To this statement by the Judge, respondent Mulvany replied in words to this effect, "Judge, you must know that I made no such statement to you last night, or any other time. I am too long in this business every to make such an injudicious and fool statement, and the only thing I said to you that was remotely close to what you have quoted was, after the jury had twice refused to sign the verdict, I remarked to you: 'Judge, it looks as though you have lost six good men and true.'" Respondent Mulvany then again denied, before the entire group, that he had made such a statement, and requested a retraction. Thereupon Miss Marie Kelly Young arose and made this statement, in substance and effect: "Why, Judge, that was [fol. 163] Mr. Woods (referring to associate counsel LeGrande Woods for defendant Mayes) who said that to you last night." Judge Browning thereupon said, in words to this effect: "*Alright,* let it go. Considering those discussions and those occurrences do you think that that sort of a case deserves prominence as a news story?

A. Yes.

Q. Would you take the responsibility of asking your editors to play that story down in the face of those circumstances?

A. No.

Q. Mr. Craig, do you have any responsibility or duty to say where a story is to be printed?

A. No.

Q. As a publisher?

A. No.

Q. It is a fact you leave the good interest, and the best interest of your paper to the editors or managing editor?

A. Yes.

Q. I will ask you whether or not you freely waive your constitutional privilege in this case? I say you freely waive——

A. Yes.

Mr. Eckhardt: That is all.

Re-direct examination.

By Mr. D'Unger:

Q. Mr. Craig, all you know about this Mayes case is what you read in the newspapers, is that right?

A. Yes, according to Will Rodgers.

Mr. D'Unger: That is all.

Mr. Eckhardt: That is all.

The Court: Are you through with Mr. Craig?

Mr. D'Unger: Yes.

The Court: If you care to be excused you are excused at this time. Wait a minute. He is a defendant. I don't believe you can be excused now.

[fol. 164] Mr. D'Unger: Yes, sir. We can excuse Mr. Craig under the rule in this case if he wants to go.

Mr. Eckhardt: You can if we agree to it.

Mr. D'Unger: It is agreeable with me. This is not a felony.

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[fol. 165] Bob McCracken, called as a witness by the State, first having been duly sworn, testified as follows:

Direct examination.

By Mr. D'Unger:

Q. State your name, please?

A. Bob McCracken.

Q. Mr. McCracken, it has been stipulated and the stipulation is in the record you are and were durin he month of May and up until this time managing or of the Corpus Christi Caller, the Corpus Christi Caller-Times and the Corpus Christi Times and that you were so acting in that capacity throughout that length of time. I will ask you whether or not during that period of time you had charge and control of the news gathering and editorial writing of the three papers published by the Corpus Christi Caller-Times Publishing Company?

A. Yes. May I explain that?

Mr. Eckhardt: What was that?

Mr. D'Unger: I asked him if he was exercising——

A. I am managing editor of the three papers, but primarily I am *respsonsible* on the morning paper. Bob Jackson is present when the afternoon paper is published and it is rare during the hours when the afternoon paper is in the process of publication that I am present. I operate in that capacity primarily on the morning paper, which is the Caller and Caller-Times.

Q. I will ask you whether or not any news stories in connection with what we have referred to here as the Mayes case were ever submitted to you for approval before publication?

A. Yes. The story that appeared Sunday morning, I forget the exact date, I read it before it was published; that second exhibit you had there, the one with the two column head on it.

Q. That would be the morning of the 27th, wouldn't it?

Mr. Eckhardt: Sunday morning.

[fol. 166] Q. Mr. McCracken, how long have you been a newspaper man?

A. Approximately ten or eleven years.

Q. I will ask you whether or not during the ten or eleven years of your engagement in the profession you have had any experience in the display of news stories with reference to prominence?

A. Yes, I have had quite a bit of experience in that.

Q. As a result of that experience I will ask you to tell me whether or not that that story we refer to there in the exhibit C-T-27 is prominently displayed?

A. Yes, it is prominently displayed.

Q. Who directed the prominent display of that story?

A. I did together with the telegraph editor, state editor; three of us discussed what play it should have and we decided on that position, that kind of headline and that size type.

Q. I hand you herewith exhibit C-28, which was the Corpus Christi Caller for the morning of the 28th, May 28th, and ask you to describe the heading and the headline and the location under which that story is displayed?

A. It is on the second best position; it has a three column 36 point head.

Q. Upon what factors did you come to the conclusion that the story merited that display?

A. Several. The case was worth front page play if for no other reason because Mr. Tarlton and Mr. Lewright were opposing counsel. If they were opposing counsel in a traffic violation case, that really is potential front page play. In the second place after the case went into trial it was introduced as evidence and witnesses were heard concerning lotteries, slot machines, gambling and marble

table operations here which made it news worth and worthy of good front page position.

Q. I will ask you——

A. In the third place——

Q. Proceed, Mr. McCracken. Pardon me.

[fol. 167] A. It was worth this mention of it when the jury reacted as it did to the Judge's instructions, and if the story, if that last development had come in earlier, say in that paper, this Sunday morning issue, it would have had an even bigger headline than it had.

Q. In your opinion as a newsman the doings there of Mr. Tarlton and Mr. Lewright, and being there, was of more interest to the public than the rights of the litigants themselves?

A. I didn't say that. We were talking about the position on the page and when two of the best lawyers in the State, certainly in South Texas, are opposing each other, you can look for fire works and look for something to happen and there is more interest from the public as a rule.

Q. Mr. McCracken, I will ask you if you personally covered this trial?

A. No, sir.

Q. Did you ever personally check the record to see what the testimony was?

A. No.

Q. Then you are not in a position, you were not in position at that time to say whether or not the stories were true and correct or not?

A. Let me answer this way. We have reporters there and we trust them to get the information. Tom Mulvaney has covered courts for many years and done an excellent job in my opinion. If I ran around checking on the reporters to see if they were right or not then I may as well not have any reporters, and do it all myself. I took his word for it.

Q. Let me ask you, Mr. McCracken, had you determined that that story was an inaccuracte and incomplete record and report of the proceedings at that time would you have had the authority to exclude it from the paper?

A. If I found it was untrue, first I would have had the [fol. 168] responsibility to see that it was amended.

Q. Mr. McCracken, you have referred to the testimony concerning gambling, I believe you stated?

A. Yes.

Q. Do you recall——

A. Marble and slot machine operations.

Q. Marble tables and slot machines?

A. Marble tables and slot machines, it is in this Sunday story.

Q. It it in the Sunday story all right?

A. Yes, sir.

Q. That would be——

A. Here it is up here.

Q. This is the portion that is with reference to the slot machines, isn't it?

A. That is right.

Q. What does it say there?

A. You mean under the heading, "Mason examined"?

Q. Here is the sentence with reference to slot machines.

A. I see. Here is the end of that. "What is the nature of that business?" "Well, cigarette machines, phonograph machines—various other kinds of machines." "Like marble tables?" "Yes." "And slot machines?" "Slot machines?" No, I don't think they have had any *solt* machines for eight years. "And you operate marble tables though?" "Free play. No pay-off." "Do you know Barney Cott?" etc.

Q. You don't know whether that testimony was actually in the record in that case or not, do you?

A. I think I know it now.

Q. Beg your parden.

A. I think I know it now. As I explained a while ago I took Mr. Mulvaney's word for it, who is an experienced reporter. I had no reason to say it wasn't.

Q. You don't know in connection with that testimony [fol.169] and the other testimony of Mr. Burchard whether the record in that case discloses that all of that testimony was to be stricken from the record?

A. No, I don't.

Q. I hand you exhibit A attached to the stipulations filed in this case and ascribed as the transcript of the Shorthand Reporter's notes taken at that trial at page 182, and I will ask you to read into the record from this point down.

A. "The Court: Let me go a little further. How do you know that these machines belonged to L. K. Mason?" "A. I have investigated that and I have——" "Q. How did you investigate it?" "A. I inquired of people who had them in that kind of business as to who was operating those." "Mr. Tarlton: That is hearsay, Your Honor." "A. Yes, I know it is, but he asked me." "The Court: Purely hearsay." "Mr. Tarlton: Purely hearsay. Every word he has testified about it is hearsay or opinion." "The Court: It will be stricken from the record. Gentlemen of the Jury, you are instructed not to weigh that with your evidence." "Mr. Lewright: All right. Is that all, Your Honor. We have no further question." "Mr. Tarlton: No more questions."

Q. Examine that where it was published on the 27th day of May and state whether or not after the Judge ordered that testimony stricken from the record, whether that fact is reported there?

A. No, it is not in there.

Q. Was that generally then, is that an accurate report of the proceedings at that time?

A. Yes, it is accurate, had no reason to believe that the testimony quoted there was incorrect.

Q. But the story doesn't reflect the fact the Judge ordered that testimony stricken from the record?

A. No, it is not mentioned.

Q. Did Mr. Mulvaney report to you the fact the Judge had so ordered that stricken?

[fol. 170] A. I don't recall whether he did or didn't, but it still would have been pertinent to the story though.

Q. Mr. McCracken, did you know who the parties involved in this suit were?

A. No, I can't say that I did. I just knew that Bush Jackson was operating as the agent for a building corporation and it wasn't—maybe I did and maybe I didn't. I don't recall. It didn't make much difference.

Q. I will ask you whether or not you know Franklin Flato?

A. Yes, sir.

Q. I will ask you whether or not you know Frederick Flato?

A. Yes.

Q. I will ask you whether or not you know Robert Flato?

A. No, I don't know Robert Flato.

Q. I will ask you whether or not you know Dr. Harry G. Heaney?

A. Yes.

Q. As a matter of fact you know Dr. Harry G. Heaney very well?

A. I know him fairly well; known him a long time.

Q. Don't you and Dr. Heaney belong to the same church?

A. Yes, sir, belong to the same church with a lot of people.

Q. Are you not associated rather closely with Dr. Heaney in church activities?

A. Well, not too closely.

Q. Had you known that Dr. Heaney was a party to what your publications has referred to as the Mayes ouster suit would you have given it the prominence that it was given?

A. Yes, sir. If I had known he was in there, if I had seen the list of the people in the suit there and the name of the "et al" in it I think I would have insisted that his name be listed for that reason they are prominent people and we are often charged with keeping a name out of print because they are personal friends or prominent people, and that is not the way we operate the Caller-Times.

Q. But you didn't know?

[fol. 171] A. No, I didn't know until all this hollering started up.

Q. Now, with reference to these news stories and all of them you will recall that the statement Burchard tendered a check for $275.00 in order to exercise his option. Do you recall that?

A. I recall it fairly, yes.

Q. Do you know what the record discloses as to the nature of that check?

A. Yes. When all of this controversy started after the thing was over you hollered about the check being post dated.

Q. I will ask you whether or not the fact that that check was post dated was mentioned at any time between the 17th of May to the date on which this information was filed?

A. Best of my knowledge, I don't know anything about dates, but it wasn't mentioned until — started arguing about a new trial.

Q. Now, Mr. McCracken, according to your best recollection were the names of any of the Flatos or Dr. Harry G. Heaney mentioned in connection with the Private Mayes

ouster suit between the dates of the 17th of May and the 9th of June, those dates?

Mr. Eckhardt: Just a minute. That is traveling outside of the information and the decree nisi; no statement was made in the decree or information charging him with any publication at that time.

Mr. D'Unger: I will withdraw the question at this time.

Q. Mr. McCracken, I hand you here a portion of a newspaper. Can you identify that?

A. Caller of Thursday, May 17.

Q. I will ask you whether or not that portion of that newspaper contains any story that refers to what we have called the Mayes ouster suit?

Mr. Eckhardt: Just a minute. We make the same objection. We are put on trial in a criminal case. We are required to answer to the allegations set out in that complaint. This is not one of the articles referred to and can [fol. 172] serve no purpose. It is not in the complaint.

Mr. D'Unger: If the Court please, I am merely having the witness identify the papers at this time and if offered in evidence later on Your Honor can then consider the last objection.

Mr. Eckhardt: I don't want the substance of it to go in.

Mr. D'Unger: Beg your pardon.

Mr. Eckhardt: You stated the substance of it.

Mr. D'Unger: I am asking him whether or not there was a story that referred to the Mayes case without reference to the subject matter.

Mr. Eckhardt: I am objecting to that too.

Mr. D'Unger: Well, it is agreeable to the State to strike the question and answer with reference to whether or not there was a story in the——

Q. I hand you herewith another portion of a newspaper and ask you to identify it?

Mr. Eckhardt: What paper is it?

A. That is Monday, May 21.

Q. I hand you herewith a clipping and ask you if you can identify that?

A. Yes, it has tagged here that it is the 25th; May 25th.

Q. Can you identify it otherwise from the type of contents of the story?

A. Yes.

Q. Do you identify it as having been clipped from the Corpus Christi Times for May 25?

A. It was clipped from the Times. I don't know whether it is May 25 or not. May 25 is marked on here.

Q. I hand you herewith a portion of a newspaper and ask you to identify that?

A. Times of May 31.

Mr. Eckhardt: What is the last one?

Mr. D'Unger: That is May 25.

[fol. 173] A. And this is Times of May 31.

Q. I hand you herewith another protion of a paper and ask you if you can identify that?

Mr. Eckhardt: What is the last you identified?

A. May 31, Times, and the next is Caller of June 1st.

Q. I hand you herewith another portion of a newspaper and ask you if you can identify it?

A. Caller of June 5.

Q. I hand you another portion of a newspaper and ask you if you can identify that?

A. Times of June 5th.

Q. I hand you herewith another portion of a newspaper and ask you if you can identify that?

A. Caller of June 6.

Q. I hand you herewith another portion of a newspaper and ask you if you can identify that?

A. Times of June 6.

Q. I hand you herewith another portion of a newspaper and ask you if yo ucan identify that?

A. Caller of June 7th.

Q. I hand you herewith another portion of a newspaper and ask you if you can identify that?

A. Caller of June 9th.

Mr. D'Unger: Now, if the Court please, we would like to have the Reporter identify these as State exhibits.

Mr. Eckhardt: You are offering them in evidence?

Mr. D'Unger: I will just as soon as they are marked.

Mr. Eckhardt: We want opportunity to object.

(The same being by the Court Reporter marked, "State Exhibits Nos. 1 to 11—For Identification.")

Mr. Eckhardt: Those exhibits——

Mr. D'Unger: The State now offers them in evidence.

Mr. Eckhardt: To those exhibits from S-1 through S-11, [fol. 174] we wish to make this objection. In this particular proceeding there has been an information filed which is in accordance with the due process of law announcing the charge or offense which they say these three parties are guilty of. It is required as the basis for the allegations. These publications were set out in the information. They don't contain any issues of the publications referred to and now offered in evidence by the State, or by Mr. D'Unger acting for the County or State. Now, if Your Honor please, we are not required to answer matters not in the information or complaint; otherwise we would not be granted a fair and impartial hearing. We are not required to answer publications and meet circumstances that are clearly outside of the information in the decree nisi. The matters are immaterial and irrelevant to the charges made here. They place upon the respondents a burden which the law of the land clearly doesn't require them to meet. Therefore, we insist they are not admissible.

Mr. D'Unger: May I meet his objection?

The Court: Yes.

Mr. D'Unger: We agree this is a proceeding in the nature of a criminal case and that the rules controlling the admission of evidence are the criminal rules of procedure. The information charges the respondents with the publication of certain articles intended and calculated to embarass the Court in the administration of justice and obstruct the administration of justice and to affect the course of justice. It is true that we don't charge them with the offense of having published the publications now offered in evidence; these publications are very closely related in point of time and under the criminal rules of evidence are admissible in [fol. 175] evidence even though not referred to for the purpose of showing intent, motive and plan or system. In this instance the only manner that the State has of proving these intents and motives of these respondents was through their testimony and under that state of facts any circumstance which would tend to disclose what their intentions were in publishing the articles specifically complained of in the information are admissible to show their intent or their plan or system. We submit it is admissible.

Mr. Eckhardt: We reiterate no allegations of any such plan or system in the information or decree nisi, and they certainly can't be held responsible for anything that occurred after the issuance of the information.

The Court: Mr. D'Unger, are you going to use these in evidence right away?

Mr. D'Unger: No, Your Honor.

The Court: I will rule on the question of their admissibility after lunch. It is 12:00 o'clock. We will recess until 2:00 o'clock.

(Whereupon the court recessed until 2:00 o'clock P. M., August 1, 1945, at which time examination of the witness continued as follows:)

Mr. D'Unger: The Court please, before proceeding with the examination of this witness, and in connection with my offer of the exhibits identified as State's Exhibits Nos. 1 to 11, inclusive, and meeting counsel's objection that the articles are not specifically made the grounds of any allegation in the information, I would like to point out to the Court that on page 5 of the information, there is contained this language: (reading) "Affiant would further state that the articles aforesaid * * *", referring to the articles, of course, specifically charged as contemptuous, "* * * in their entirety, and considered together, were calculated and [fol. 176] intended to falsely present to the public the nature of the proceedings had."

There is also this allegation of intent contained in the information, in the charging portion of the information; on page 6, we find this: (reading) "Affiant would further show the court that the purpose of this representation to the citizenry of the City of Corpus Christi and County Nueces was intended and calculated to reflect upon the integrity of the court, and bring it into disrepute and prejudice and influence the court in its ruling on the aforesaid motion for a new trial, and that the said publications and circulations were made for the purpose and with the intent of scandalizing the court, and intended to influence or overawe its deliberations in said pending cause, and were made at a time and under circumstances calculated to affect the force of justice in said proceedings, and were so calculated to do and were intended for that purpose."

Now, we submit, your Honor, that these publications are

entirely admissible as circumstances going to show the intent of the respondents in making the publications that are complained of. That is the purpose of the State; to simply introduce them as exhibits, to show that intent, and it is not the purpose nor the intent of the State to question these respondents with reference to any of them. We are merely seeking to introduce them as exhibits.

Mr. Eckhardt: Let me make this response to that your Honor: the circumstances referred to could be only the circumstances existing at the time of the publication of the articles set forth in the information. Repeatedly the articles are referred to as in the information, meaning the ones in the information, and not these sought to be introduced [fol. 177] now. The circumstances referred to must mean the circumstances surrounding the publication of these articles; that is clear to us. We add that to the objections we have made.

The Court: Objection overruled; the articles will be introduced.

Mr. Eckhardt: Note our exception.

Mr. D'Unger: Did I understand the Court's ruling that they will be admitted for the limited purpose of showing intent only?

The Court: That's right.

Mr. Eckhardt: Note our exception.

(Thereupon, said newspaper excerpts, having been previously marked by the reporter for identification as State's Exhibits Nos. 1 to 11, inclusive, were received in the evidence, and true and correct photostatic copies of the same are to be found, bound in Volume 4 of this record.)

Q. Now, Mr. McCracken, before we proceed with the examination, I neglected to ask you this morning—you are fully aware that this is a proceeding of a criminal nature?

A. Yes, sir.

Q. And that you may claim the privilege of immunity under the constitution, and refuse to answer any questions?

A. Yes, I understand that.

Q. Do you waive that immunity?

A. I waive it.

Q. Thank you. Now, Mr. McCracken, I will ask you to refer to the exhibit attached to the stipulation, and identified as C-26.

[fol. 178] A. Where is this stamped? Is it somewhere on there? It would be easier if you tell me the date of the paper.

Q. That is the Caller of the 26th.

Mr. Eckhardt: Here, I can find that for you; it's not on the front page.

A. Yes, here it is.

Mr. Eckhardt: No, it's the Caller; you are looking for the Caller, Mr. D'Unger?

Mr. D'Unger: The Caller, yes.

A. Alright, here it is.

Q. I will ask you to refer to the top of the—or the bottom of the first column on the left hand column, that portion of the story starting with, "Burchard further claimed that although he had not known of the option clause, when he had learned of it, he had immediately proffered a check for $275.00 rental." Have you got that?

A. Yes, sir.

Q. I will ask you whether or not the fact is reported that he proffered a check for $275.00 rental?

A. Yes, that's stated here.

Q. Does it say anything about that check being post-dated thirty days?

A. No.

Mr. Eckhardt: The Court please, that—the records, I think, could speak for themselves.

Mr. D'Unger: I beg your pardon, I don't think there is any record.

Mr. Eckhardt: The fact that this doesn't state that would be clearly shown in the article itself.

Mr. D'Unger: Oh, I see—that is rather a negative way of putting it.

A. I said this morning that it wasn't mentioned.

Q. I believe you stated that—stated this morning that as [fol. 179] nearly as you knew, there had never been any mention of the fact?

A. Not until the time came for the appeal—what fact?

Q. That the check had been post dated?

A. Yes, sir.

Q. You stated this morning, I believe, Mr. McCracken, that you personally had not covered the trial?

A. That's right.

Q. And that you personally knew nothing of what the record in the case reflects, is that right?

A. That's right.

Q. Now, I will ask you to take Exhibit C-29——

A. What is the date on that?

Q. That would be the Caller for the 29th; those numbered reflect the dates and the initials, the Caller.

A. The Caller of the 29th; alright.

Q. Now, I will ask you to refer to the story under the headline, "Browning's Ruling Prompts Vet's Meeting."

A. Alright.

Q. That story carries the lead, "Representatives of seven ex-service men's organizations in Nueces County are scheduled to meet tonight to act on a resolution requesting that County Judge Joe D. Browning grant a new trial in the Playboy Cafe eviction suit. Directors of the Veteran's Council, representing 1,231 members of the ex-servicemen's groups, announced last night the resolution also will petition that Judge Browning 'let the issues rest with the jury'". As far as we have gone now, do you know what those seven ex-servicemen's organizations were?

A. Not,—not off-hand, I don't, no.

Q. Do you know the number of the membership of these organizations?

A. No.

Q. Do you know what the source of this information was?

A. I know it was a member, or an official, I don't know which; probably an official of the organization.

[fol. 180] Q. Of one organization, or of the seven?

A. Well, this council, referring to one organization.

Q. I will ask you whether or not the statements contained in this story with reference to the activities of these veterans's organizations are part of the record in the Mayes case?

A. Ask that again?

Q. I beg your pardon?

A. Ask that question again.

Q. I will ask you whether or not these activities, as reported in this story——

Mr. Eckhardt: That's already stipulated.

Mr. D'Unger: No, it isn't.

Mr. Eckhardt: I beg your pardon; I'll show you here that it has been——

Mr. D'Unger: I'm asking him whether these activities, as reported, form any part of the record in the Mayes case.

Mr. Eckhardt: Are you referring to the resolution?

Mr. D'Unger: I am referring to the scheduling of the meeting.

A. The activities of the veterans's organization?

Q. Yes, sir.

Mr. Eckhardt: It is stipulated on page 23 here, of the stipulations.

Mr. D'Unger: We haven't even identified this resolution yet.

Mr. Eckhardt: It's the resolution—alright, go ahead.

Q. I will ask you whether or not the activities and the scheduling of this meeting, and the advance notice of what the resolution would be, were any part of the proceedings had in the Mayes case?

A. I don't think so.

Q. Now, I will ask you to take the Caller for the 30th.

A. Alright.

Q. The story there is found under the head, "Playboy [fol. 181] Cafe Verdict Rapped by Vets." The lead on the story is, "A motion for new trial for Pvt. Joe L. Mayes, was filed by W. M. Lewright and LeGrande Woods, defense counsel, yesterday afternoon. A few hours later the Sailors' and Soldiers' Advisory Council of Corpus Christi passed a resolution labeling County Judge Joe D. Browning's order for a directed verdict against Mayes 'a gross miscarriage of justice' ". Now, do you know the source of that information with reference to the Soldiers' and Sailors' Advisory Council of Corpus Christi, their passage of the resolution?

A. No, I don't; I didn't write the story.

Q. Do you know whether or not the passage of this resolution was any part of the proceedings in that Mayes case?

A. I don't think it's any part of the proceedings in the Mayes case, no.

Q. Did you make any effort to determine whether it was or not?

A. It just doesn't seem reasonable that it would be.

Q. Well, but did you make any effort to determine——
A. No, I didn't; of course not.

The Court: Just a minute, Mr. D'Unger. There is at least one witness, and possibly two have come into the Court-room since we started here.

Mr. Eckhardt: We haven't invoked the rule.

Mr. D'Unger: No, but I would suggest that they be instructed to withdraw, and they be called on reasonable notice when they are needed.

The Court: How soon do you think we will need them?

Mr. D'Unger: I don't see how we can get to them before morning now.

The Court: Shall we let them come back in the morning?

Mr. D'Unger: That should be alright.

The Court: The witnesses that were subpoenaed in this case, please stand up. Mr. Kirk, you can come back here [fol. 182] in the morning at nine-thirty; you will be excused until then.

Q. Mr. McCracken, in your opinion as a newspaper man, wasn't this story about the Mayes case given a very prominent place in the news, locally?

A. Throughout the whole case?

Q. Yes, throughout the whole case?

A. Yes, sure it was.

Q. What is your editorial policy with reference to forcible entry and detainer suits as a rule?

A. We have no editorial policy with reference to forcible entry and detainer suits as a rule.

Q. How long have you been connected with the Caller-Times?

A. Oh, about thirteen years, I guess; I don't know.

Q. Can you tell me of one instance in the past thirteen years when the result of proceedings had in a forcible entry and detainer case, has ever been reported on the front page of either of the three newspapers published by the Caller-Times Publishing Company?

A. This is the first one I ever heard of, but this is the first one that I ever heard of that developed all the testimony and the interest that this one did.

Q. Well, are you sure that was the testimony that you published?

A. Reasonably sure, yes.

Q. In spite of the fact that we read from the record the Judge's statement that that testimony was stricken from the record?

A. It's still testimony.

Q. Now, again referring to the Caller for May 30th, we find, on the extreme left-hand column, the Crow's Nest. You are the writer of the Crow's Nest, are you not?

A. Yes.

Q. How long have you been writing the Crow's Nest?

A. I guess about ten years.

Q. Do you write that for yourself, or for the newspaper?

[fol. 183] A. Well, I write it for the newspaper.

Q. You are paid for writing it, are you?

A. I am paid for working for them, and that is part of the work I do.

Q. That is part of the work you do for the newspaper?

A. Yes.

Q. You don't buy any space to publish that?

A. No.

Mr. Eckhardt: That's already stipulated.

Mr. D'Unger: Quite right.

Q. You don't represent any other interests in the publication of the Crow's Nest, do you?

A. No.

Mr. Eckhardt: That's also stipulated.

Q. Now, I will ask you to refer to that column, the second paragraph. "The incident around which the present controversy rages, involves such a case. Bush M. Jackson, agent, employed a technicality in seeking to break the lease of Pvt. Joe L. Mayes of the United States Army, on a ground-floor location in the old elks club building where Mayes operated a cafe." What was the source of your information as to the technicality being involved?

A. The news stories published.

Q. In other words, you got your information from the newspaper?

A. Yes, sir.

Q. You state here that you are not a lawyer?

A. That's right.

Q. Do you know now what the reason urged for the cancellation of that lease was?

A. I'm not very clear on it, even now, no.

Q. But you did call it a technicality?

A. Yes; here it is, right here.

Q. The case you refer to there is, of course, what we refer to as the Mayes case?

[fol. 184] A. Yes.

Q. And that case, at that time, at the time this article was published, was pending in the County Court of Nueces County, was it not?

A. The appeal was pending, yes.

Q. The motion for new trial?

A. Yes.

Q. Now, that editorial recites that Judge Browning had returned—instructed the jury to return a verdict for the plaintiff and against the defendant, and then on down below the fold here, you go on and say, "Browning's behavior and attitude has brought down the wrath of public opinion upon his head, and properly so." Why do you feel that the wrath of public opinion was properly brought down——

A. Well, it goes ahead and explains it on down in the column.

Q. Alright, why—where does it explain that?

A. (Reading:) "Then the plaintiffs' counsel offered a motion for instructed verdict for his client. It was granted immediately, without having him cite his authority, or without giving the defendants' attorney a chance to argue against it."

Q. Does that explain why the wrath of public opinion——

A. Yes, I think a judge, sitting as an impartial judge, should hear both sides, and arguments by both sides, and that is he doesn't do that, public opinion has a right to be aroused, and should be.

Q. And it is your contention—was it your contention at the time this story was written that the judge did not hear both sides of the question?

A. Yes.

Q. What did you base that conclusion on?

A. On the reports of the proceedings.

Q. Do you recall the publication of a story which stated that the defendants had presented a motion for an instructed verdict, and defense counsel had argued it for ninety minutes?

[fol. 185] A. Yes.

Mr. Eckhardt: Are you going to travel outside of the stipulations, or are you going to stay within it; I think that has been stipulated.

Mr. D'Unger: I'm just trying to get his reasons here——

A. I read some of that in the stories, and either Tom or someone, maybe Billy Periera may have told me about it, I don't recall; I either got all from the stories, or maybe some of it from conversations.

Q. You didn't know from your knowledge, whether he heard both sides or not?

A. Except what I read, and what they told me; and they had no reason or occasion to lie to me; I believed them, my information on it.

Q. You refer to the result of the case here in this language: "That was the travesty on justice."

A. Yes, I tied that in to what has gone before; the whole thing has to be read. You can't just pick out a sentence here and a sentence there, and be able to pick out the whole meaning. The whole column speaks for itself, and explains itself, I think.

Q. The fact remains that you here referred to this specific case?

A. Yes, the whole column is about it.

Q. And you termed the result a travesty on justice?

A. Yes, under the circumstances.

Q. Now, you further state here that the first—down in the second paragraph from the bottom, "There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated." I would like to have you explain that sentence, Mr. McCracken. If there was no way of knowing whether justice had been done——

A. Hearing both sides, I think, is the first rule of justice. Both sides must be heard. As I understand the proceedings here, counsel for the plaintiff presented his argument for [fol. 186] an instructed verdict, and was heard, and counsel for the defendant was not heard in his argument. That is the whole gist of that.

Q. Then the logical conclusion from the language was that injustice was done, is that right?

A. Possibly; and again, I would say I don't know whether it was or not. One sentence follows the other there. I was striving to be fair in the discussion; I wasn't trying to

influence the Court one way or the other, but that is the way I felt about it then, and that is the way I feel about it now.

Q. Mr. McCracken, I will ask you if you can tell me of any rule of law that requires a judge to hear argument on——

A. I don't know——

Mr. Eckhardt: Your Honor, this witness is not a lawyer, and I don't think he should be questioned on a rule of law. He is a layman.

Mr. D'Unger: The Court please, he is writing on the subject.

A. I said no, I didn't know. I said that in my column, too. I am not talking about law so much as I am about justice, here.

Q. So then, if you didn't know, don't know, you are not in position to say whether the judge was right or wrong in not hearing——

A. I said that here in the column, said I didn't know whether he was right or wrong.

Q. Yet you say the public wrath was properly descended on his head, whether he was right or wrong?

A. Yes. Let me tell you why. I think when a jury turns around and refuses to carry out the judge's instruction, well, the public certainly has occasion to be aroused about it, to find out what in the world is the matter. You asked me a while ago if I ever heard of the paper playing up a story like this before. No, I never have, but at the same time I never heard of a judge doing what this Judge did. Whether it's in this Court, or another court, or in another state, I think the public should be aroused.

[fol. 187] Q. Do you know the function of the jury in trials?

A. I am familiar with it, I guess.

Q. What is your version of its duty?

A. It is to hear the testimony and bring in a verdict.

Q. A verdict on what?

A. On the charge, bring in a verdict according to the charge given by the judge.

Q. As a matter of fact, they are the fact-finding body, are they not?

A. Yes, they certainly hear all of it.

Q. Do you know who decides what the law is in a case in court?

A. It's the judge.

Q. The judge.

A. Sure.

Q. Do you know what the nature of the juror's oath is when he is sworn in?

A. I know the nature of it, but I hesitate to try to repeat it or describe it.

Q. Do you know whether or not it contains language that binds them to take the law as given them in charge by the Court?

A. I don't know; I imagine it would, though.

Q. So then in other words, whether the judge, from a legal point of view, was right or wrong, he was still wrong because he didn't follow the dictates of the jury in that case?

A. No, I didn't say that.

Q. You don't think so?

A. No.

Q. Well, isn't that the burden of the Crow's Nest?

A. No.

Q. What do you mean, then, by a travesty on justice?

A. Well, the whole thing is explained there, just exactly as I felt about it. You can't pick out just a sentence here and a sentence there——

[fol. 188] Q. What is the main point in this editorial, then?

A. The main point is, it was a very unusual case, and an unusual procedure. And the thing was decided, as it turned out, on a point of law, according to a point of law that I knew nothing about, of course, and in my opinion the Judge didn't know too much about it. And if the judge had heard both sides argue, and had then made an effort to look it up, to decide it in his own mind, and then tell the jury accordingly, explain it to them in a way that they could understand, I don't think this jury would have balked on him, and I certainly would not have written this editorial. The whole point of my editorial was that the Judge, in deciding a case of this kind—or a question of this kind, particularly when setting in a Court of last resort, should be a lawyer; that is the point of the whole column.

Q. Do you know that the law of this state provides that the County Judge need not be a lawyer?

A. Oh, yes; it says that right in the first paragraph there. (Reading): "Probably the basic fault lies with the Texas constitution and statutes which vest judiciary authority in a county judge but which do not require the occupant of the office to be an attorney." I blamed it on the law, not on the judge.

Q. Do you recall how many terms Judge Browning has served in this capacity?

A. I think this is his third or fourth, isn't it?

Mr. Eckhardt: That's stipulated.

Q. Do you recall who his opponent was in the last election for the office?

A. Let me think a minute—Neal Marriott.

Q. Do you know whether or not Neal Marriott is a duly licensed and practicing attorney?

A. I think he is.

Q. Mr. Marriott was not elected, though?

A. Obviously not.

[fol. 189] Q. Do you know whether Judge Browning has had other opponents in the past who have been duly licensed and practicing attorneys?

A. Off-hand, I can't recall; I imagine so.

Q. Can you recall the last time a duly licensed and practicing attorney held office as County Judge in this County?

A. I believe it was when Paul Snyder was Judge?

Q. How long ago is that?

A. Well, I think he was Judge Browning's predecessor.

Q. Judge Browning's predecessor in office?

A. I think so.

Q. Prior to that, do you recall any other?

A. No, off-hand, I don't.

Q. How far back does your memory go on County Judges in Nueces County?

A. On County Judges in Nueces County, back to the time of Judge Benton.

Q. Mr. McCracken, I will ask you whether or not, if you know, there was any report published in the paper of the proceedings had in this Mayes case when it was tried in the Justice Court?

A. Yes, I think there was.

Mr. Eckhardt: The Court please, I don't think that is material or relevant; we make the same objection to that

as we did to the introduction of the exhibits numbered S 1 to S 11. We would like to have the record reflect our same objection to this.

Mr. D'Unger: The Court please, the information I am trying to elicit was whether it was or was not publicized, and I am going to ask Mr. McCracken to produce the paper in which it was published, if it was.

The Court: What was the question; read that question.

Mr. Eckhardt: It's already introduced in evidence here.

The Court: Read the question.

Reporter: (Reading) "Mr. McCracken, I will ask you [fol. 190] whether or not, if you know, there was any report published in the paper of the proceedings had in this Mayes case when it was tried in the Justice Court?"

Mr. D'Unger: Well, just withdraw the question, Mr. Reporter. I will ask Mr. Mulvany; he can probably tell us all about it.

A. It was the nature of the testimony more than the nature of the suit that made this story prominent as——

Q. Now, Mr. McCracken, is it your testimony that these articles and this editorial represent a fair and reasonable and a true and accurate presentation to the public of the proceedings had in the Mayes case?

A. Yes, I think so. It's certainly fair.

Q. You think it was fair?

A. Yes.

Q. Let me ask you this question, Mr. McCracken. Had you thought—or if in your opinion these stories, as you read them prior to their publication, were calculated to obstruct the administration of justice, could you have excluded them from publication?

A. I would have excluded it, the stories from publication. If they had had anything that in my opinion would have had the effect of obstructing justice, I would have personally altered or stricken that part.

Q. I ask if you could have stricken it?

A. If I could have held it out of the paper?

Q. If you could?

A. I could have, but I would not have done so on my own authority; I would have conferred on if with the editar first.

Q. Well, as a matter of fact, you didn't.

A. No, I didn't. They're in the paper.

Q. And it is your testimony that this is a fair and accurate presentation to the public of the proceedings had in that trial?

A. In my opinion it is.

[fol. 191] Q. You have stated, I believe, that you don't recall any mention ever being made of the plaintiffs, Flato and Heaney?

A. Not until the contempt action came up, no.

Q. But from the first date complained of, which is the 25th, I believe, or the 26th of May——

A. No, no, there wasn't any mention of them.

Q. There was no mention made of them?

A. No.

Q. Beyond that, was there any testimony—I mean any publication of the fact that one of these plaintiffs was in the army just as big as Mr. Mayes was?

A. No, I don't recall that. I'm pretty sure it wasn't.

Q. I am going to hand you here Exhibit A, attached to the stipulations, filed in this cause, and turn to page 145, which is a portion of the testimony of Bush M. Jackson, one of the plaintiffs in that cause, and I will ask you to read into the record lines 25, 26 and 27, on page 145 of that record.

A. (Reading):

"Q. Now, then——"

Mr. Eckhardt: Just a minute; that's already in the record.

Mr. D'Unger: This is with reference to his opinion that it was a fair and impartial presentation.

A. "Q. Now then, you say these premises are owned by Edwin Flato, B. M. Jackson and Harry G. Heaney?

A. Lt. Robert Flato with the armed forces."

Q. Now, there was no mention made in any of your stories of the fact that Lt. Robert Flato was with the armed forces was there?

A. Not that I recall.

Q. I again hand you herewith Exhibit A attached to the stipulations, opened at page 162, and ask you to read—this is the testimony of Mr. Burchard—and ask you to read line 19.

A. (Reading):

[fol. 192] "A. I told him I would pay the additional $25.00 or give him a new check for $275.00.

Q. Is that when he said he wouldn't take it; he would send back the $250.00 check?

A. Yes, sir."

Mr. Eckhardt: The Court please, this witness stated that he had not read the record. I don't see the purpose of it. It's in the record, all that.

Mr. D'Unger: The Court please, he stated that in his opinion the presentation and publication are fair and accurate presentations of the proceedings had. I am going to ask him that question again after I get through with this, if I may be permitted to continue.

A. I see what you are driving at. The answer is still the same.

Q. Well, just to make it brief, there was never any testimony—never any of the testimony of the defense witness, Benjamin Vaughan, published in your paper, was there?

A. I don't know.

Q. You don't know?

A. I don't recall. You can't publish everything that goes on in a trial. We wouldn't have enough paper to do it.

Q. Can you publish both sides of it?

A. Yes, sure.

Q. In your opinion you could publish both sides of it?

A. Yes.

Q. Now, Mr. McCracken, what is your editorial policy with reference to the legal rights of service men?

A. Well, naturally, we defend.

Q. Have you ever defended any prior to this case?

A. Well, I wouldn't say that we defended any in this occasion. All we did was to report the proceedings in Court. The question as to whether Mayes was a service man or not, as far as the Caller-Times Publishing Company is concerned, had nothing to do with it.

[fol. 193] Q. Well, if the fact that the man, Mayes, was a service man had nothing to do with it, how do you account for the fact that every story published described has as Private Joe L. Mayes, or Private Joe L. Mayes of the Army, now stationed at Camp Hood?

A. Well, every story in connection with this contempt case identified me as Bob McCracken, Managing Editor of the Caller-Times, for the same reason as that. It's just to identify him.

Q. You didn't refer to him as Insurance Man Mayes, or Cafe Man Mayes?

A. No, because he is in the Army, and if he is in the army, he's not an insurance man. Or at least I never heard of that.

Q. Do you know whether or not the record reflects that he is an insurance man?

A. I don't know. It may have reflected that he was one before he went in the army.

Q. Alright, just one more question, Mr. McCracken. Isn't all you know about the Mayes case what you read in the paper?

A. What I read in the paper, and conversations with the two reporters covering it.

Mr. D'Unger: That's all.

Cross-examination.

By Mr. Eckhardt:

Q. Mr. McCracken, I ask you to look at Exhibit A, page 146, and read to me, commencing with the first line, through page 148; just read that into the record.

A. The first line, through 148; three pages?

Q. Yes.

Mr. Eckhardt: Or I will read it if you want. I'll read it to him and ask him if it isn't a part of the record.

Mr. D'Unger: That's alright.

A. I'll read it.

[fol. 194] Q. That is Mr. Bush M. Jackson testifying there, isn't it?

A. Yes, sir.

Q. Better look back and see there.

A. Yes, that's right, it is.

(Whereupon the witness read from the exhibit mentioned as follows:)

Q. Does Edwin Flato know the fact this suit is filed and being prosecuted?

A. I don't know.

Q. Did you ever talk to him about it?

A. I didn't.

Q. Did you ever tell him you were kicking this boy in the Army at Camp Hood, you were kicking him out of the——

Mr. Tarlton: We object to "kicking him out."

Mr. Lewright: Withdraw the "kicking out."

Q. Did you tell him you were going to put this boy out of the building and give it to Doc Mason?

Mr. Tarlton: We object to that. He can ask, "Did he tell him he was going to bring this suit," but the legal consequences is a conslusion of law.

The Court: Objection sustained.

Mr. Lewright: To which we except.

Q. Did you ever tell Mr. Flato you were going to file this suit?

A. Which Flato?

Q. Edwin Flato?

A. No, sir.

Q. Does the old gentleman know you are pursuing this course of conduct?

A. I don't know that he does.

Q. In fact you know he doesn't because he wouldn't approve of it?

Mr. Tarlton: We object to what somebody else would or wouldn't approve of.

[fol. 195] The Court: Objection sustained; highly prejudicial and the jury is instructed to disregard the question.

Q. Does Dr. Harry G. Heaney know it?

The Court: The jury is instructed to disregard that question.

Mr. Woods: Does Your Honor rule we can't ask the question about one of the owners of the building?

The Court: The question wasn't——

Q. I will ask you this question; does Dr. Harry G. Heaney know of it?

Mr. Tarlton: We object to the question as to what Dr. Heaney knows or doesn't know. He can testify, of course, whether——

Mr. Woods: His name is on this suit. It is brought in the name of Dr. Heaney. We are seeking to find out if he knows it.

The Court: Objection overruled.

Mr. Tarlton: And only Dr. Heaney can testified as to what he knows.

Q. Does Dr. Heaney know it?

A. Not to my knowledge.

Q. Now, what other Flato—You say there are other Flatos interested?

A. Yes, sir.

Q. Who is the other two?

A. Frederick Flato,

Q. Where is Frederick Flato?

A. Where is he? I don't know.

Q. He is in the United States Army, isn't he?

A. I don't know.

Q. Does he know of the institution of this suit?

A. He does.

Q. How did he learn of it?

A. By hearing counsel and me discussing the case.

[fol. 196] Q. Is there another Flato?

A. Still another, yes, sir.

Q. What is his name?

A. Franklin.

Q. Is he in the armed service?

A. He isn't.

Q. Does he know of this suit?

A. He does.

Q. How did he learn of it?

A. By consultation.

Q. When and where?

A. We had one conference in his office at the Corpus Christi Hardware Company office.

Q. The other is Robert?

A. Robert.

Q. Where is he?

A. Armed forces.

Q. Does he know of it?

A. I don't know whether he knows of it.

(End of witness' reading.)

Q. Now, Mr. McCracken, from that statement in the record, it is apparent that some of the parties to this suit were never consulted by Mr. Jackson when he brought this suit?

A. Seems to me, yes, sir.

Q. Now I want to ask you this question. If you had thought that any of these articles, or the editorial, the column, had the effect of coercing or interfering with the administration of justice, would you have excluded them?

A. Yes, sir; in fact, right there, on this editorial, I submitted it to the editor of the paper, Robert M. Jackson, to go over it, and we made some changes in it, just to check the fact that it was written in a manner that we considered to be fair.

[fol. 197] Q. Mr. McCracken, something has been said of policy in forcible entry and detainer suits, whether you had a policy. Isn't it a fact that it is not the kind of a suit, but the circumstances in the case that determine the publication or not, in your papers?

A. That's right; the kind of suit has nothing to do with it. I said while ago that it is the nature of testimony brought out and the behavior of the jury.

Q. It has also been stated that, regarding the first rule of justice, whether it had been observed in this case. Did you understand, in this case, from what you heard from the newspaper reporters, and what you read in the papers, that in this particular case the Court's judgment was final?

A. Yes, sir.

Q. Did you——

Mr. D'Unger: The Court please, I am going to object to that; it would be entirely immaterial what this witness' conclusions of the law would be, or what he learned.

Mr. Eckhardt: The Court please, that is going to another question; I think that is perfectly evident. I am going to try again, and I think the Court should permit him to answer.

The Court: Let him answer.

Q. Now, in a case of that kind, what is your concepcion of the first rule of justice to be observed with respect to hearing both sides, where final decision rests with the Court?

A. State that again?

Q. I say, in a case where the Judge has final decision in a case, what is your idea of the first rule of justice to be observed; to hear both sides?

A. Yes, sir, as I said, to hear both sides, and weigh each against the other, and make the decision accordingly.

Q. One of the major objectives in writing this Crow's Nest, as I read it—I will ask you whether it is a fact—was

[fol. 198] a criticism of the fact that lawyers—that County Judges in this State do not have to be licensed and practicing lawyers?

A. The primary object of that editorial was a criticism of that law, and not a criticism of any individual or Court.

Q. And that criticism is what you have stated in your testimony?

A. Yes, sir.

Mr. Eckhardt: That's all.

Redirect examination.

By Mr. D'Unger:

Q. Well, if your principal point in that editorial was a criticism of the law which permits a man without a law license to be a County Judge, you did elect to illustrate the point with the decision of a Judge handed down in a case then pending, did you not?

A. A Judge who wasn't a lawyer. As far as I was concerned when I wrote that editorial, the case was settled. The fact that a new trial had been asked for was neither here nor there; it stood to reason that a judge who had handed down the verdict would stick by his guns; that is common sense. I dismissed any thought of a new trial to be granted at all.

Q. Mr. McCracken, you have just read into the record portions of Exhibit A, with reference to Mr. Edwin Flato. Was Mr. Edwin Flato a party to this action, this forcible entry and detainer suit?

A. Isn't he? It has a bunch of people covered by that "et al." in there; I don't know if it's Edwin or not, I don't think so. There was those two, Franklin and Frederick, and the other young boy, Robert, I think it is. I don't know Edwin.

Q. Well, as a matter of fact it is stipulated here that the plaintiffs are Bush M. Jackson, Franklin Flato, Frederick Flato, Robert Flato, and Harry G. Heaney, which list does not include him.

[fol. 199] A. Well, you have that list there; I'll take your word for it. I don't need to look at it, Good Lord.

Q. So it wouldn't make much difference whether Edwin Flato knew anything about the law suit or not, would it?

A. No. I don't think so; it doesn't make any difference at all.

Q. But notwithstanding that fact, none of this testimony was published, either?

A. No, we can't publish all of it in any case; we can't publish all of it in this one, as much as we would like to. I think we used about three columns of paper as it was, and you are bound to leave out something.

Q. Well, I will ask you if the—if, under the present paper conditions, that isn't a pretty lavish use of space?

A. Not considering the story, it wasn't.

Q. Now, I hand you herewith again Exhibit A, open at page 154, the testimony of the plaintiffs' witness, Ben Vaughn, and I ask you to read into the record this answer on line 24.

A. (Reading): "Well, Mr. Jackson and Mr. Mason and the two Flato boys were in my office on the 19th, as I recollect, and Mr. Burchard and Mr. Mason came back on the afternoon of the same day, and Mr. Burchard and Mr. Mason came back, I presume to discuss with me what Mr. Burchard was going to do with reference to the premises. He came in and advised me he was agent for Mr. Mayes and that he didn't know exactly what Mr. Mayes wanted to do,——"

Q. That is from the witness, Ben Vaughn?

A. Yes, sir.

Q. None of that testimony was published, was it?

A. No, that is the first I ever read that.

Q. Mr. McCracken, after having glanced at this record, and having seen the portions of the testimony that were admitted, taking into consideration the fact that the plaintiffs in this case were prominent local people, and the fact [fol. 200] that the check which was tendered for the exercise of the option that was dated seven days late, and then post-dated thirty days, in your opinion was the presentation of the proceedings a fair, impartial, complete and accurate presentation?

A. Fair,—what else?

Q. Fair, complete, accurate and impartial?

A. It was fair, accurate and impartial; of course, it wasn't complete.

Mr. D'Unger: That is all.

Recross-examination.

By Mr. Eckhardt:

Q. I hand you issue of the Corpus Christi Caller-Times of May 27th, and direct your attention to page 8, and ask you to read a portion of the third to the last paragraph on the page.

A. (Reading): "Burchard said he knew Doc Mason was operating marble tables through his investigation of federal stamp licenses issued, but he admitted when pressed for the facts that his knowledge of other 'rackets' w s chiefly hearsay."

Mr. Eckhardt: That is all.

Redirect examination.

By Mr. D'Unger:

Q. Mr. McCracken, I will hand you Exhibit A of the stipulation, opened at page 189——

A. 79.

Q. —179, it being the testimony of the witness, Burchard, and I will ask you to read enough of that to yourself to be able to identify what the import of the testimony is.

Mr. Eckhardt: If the Court please, I don't think that is proper. I think the testimony speaks for itself. I don't think the witness can interpret the testimony.

A. I get the gist of it.

The Court: Just a minute. What was your objection? [fol. 201] Mr. Eckhardt: I think the question that the witness state the import of the testimony is a legal conclusion. You have to see all the testimony.

Mr. D'Unger: The objection is well taken. I will rephrase that question.

Q. Read enough of it to satisfy yourself as to what he is testifying about——

Mr. Eckhardt: That is the same question. I make the same objection.

The Court: The objection is sustained.

Mr. D'Unger: If the Court please, he just asked the witness to read a portion of the printed news story, which is

definitely not the record in the Mayes case. That portion of the news story had to deal with the operation of marble tables and gambling, and then it goes on to say that the witness admitted it was chiefly hearsay, and the actual record in the case shows that the Court ordered that all that testimony be stricken.

A. I read that this morning.

Mr. Eckhardt: He read it this morning. He read it once.

Mr. D'Unger: All right, I withdraw the question, if it is in there once. That is all.

Mr. Eckhardt: The whole record speaks for itself.

A. Are you through?

Mr. Eckhardt: Yes.

(Witness excused.)

Mr. D'Unger: Judge, could we have a short recess?

The Court: We will recess for about ten minutes.

(Thereupon the Court took a few minutes recess.)

[fol. 202] Mr. D'Unger: Are you ready to proceed, your Honor?

The Court: Yes.

Mr. D'Unger: I would like to put Mr. Mulvany on the stand.

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Tom Mulvany, one of the Respondents, called as a witness by the State, being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Direct examination.

By Mr. D'Unger:

Q. State your name.

A. Tom Mulvany.

Q. You are one of the respondents in this proceedings?

A. Yes.

Q. Your name is spelled without an "e", is it not, in Mulvany?

A. That's correct.

Q. Mr. Mulvany, you understand that this is in the nature of a criminal proceeding, and that the rules of criminal evidence apply?

A. Yes.

Q. And you understand, further, that you have, under our Constitution, the privilege of claiming immunity. That is, if you do not so desire, you do not have to answer any questions, any answer to which might incriminate you in any way. Do you waive that immunity?

A. I do.

Q. Mr. Mulvany, you are the reporter who covered the Mayes trial, of action No. 3624, styled B. M. Jackson, et al. vs. Joe L. Mayes, et al., in the County Court at the May term of this year, are you not?

A. Yes.

Q. Mr. Mulvany, were you present a great deal of the time during the trial of that case?

[fol. 203] A. I was present at all of it.

Q. All of the time, during all of the proceedings?

A. Perhaps five minutes less than all of the time.

Q. But, with the exception of an occasional brief interval, you were present at all times?

A. Yes.

Q. It is stipulated that you reported and wrote the news stories that are shown on the Exhibits attached to the stipulations here and identified as "C-26" through "T-31."

Mr. Eckhardt: "C-31." It is the Caller. I am not being hypercritical about that, Mr. D'Unger.

Mr. D'Unger: Well I believe you are right.

Q. Those are the papers running through from May 26th, the Caller, to the Caller published on the 31st day of May?

A. The Caller on the 26th?

Q. The Caller on the 26th, I believe.

A. No, the Times on the 26th, Caller-Times on the 27th, Caller and Times on the 28th.

Mr. Eckhardt: I think he misunderstood the question. You were asking about the stipulation.

Mr. D'Unger: Well, I asked him if he had reported and written the news stories in those issues.

Mr. Eckhardt: I think it is admitted in the stipulation.

A. I believe the stipulation is correct, anyway.

Q. That you did write them?

A. Yes.

Q. With one exception——

A. That's correct.

Q. —where you furnished the facts and Mr. Periera, I believe, wrote the actual story?

A. That's correct.

Q. Do you recall the date on which that trial started, Mr. Mulvany?

A. May 25th.

[fol. 204] Q. Do you recall when the defense witness, Burchard, took the stand?

A. I think it was May 26th, in the morning.

Q. That would be Saturday morning, would it not?

A. That's right.

Q. And do you recall whether or not he testified at that time with reference to a $275.00 check which he testified had been tendered for the purpose of exercising the option on the premises in the Old Elks Building?

A. I recall his testifying concerning that check, yes sir, whether it was in the morning of Saturday the 26th, I am not sure.

Q. Well, do you recall——

Mr. D'Unger: May I make a sidebar remark, please?

(Conferring with counsel for Respondents in low tone of voice.)

Mr. Eckhardt: All right.

Q. Do you recall whether or not on Saturday morning Mr. Burchard testified in connection with the post-dating of that check, that he had made that fool mistake?

A. I believe he used that exact language, that it was a fool mistake.

Q. Do you remember whether or not, on cross-examination, on that same occasion, he testified that he had dated that check April 21st instead of March 21st?

A. Yes.

Q. Do you recall that he testified that he had tendered the check on the 21st day of March?

A. By "tender," do you mean mail?

Q. Mail, or deliver?

A. I think he testified he mailed it on the 21st of March.

Q. Mailed it on the 21st of March?

A. Yes.

Q. I will ask you, Mr. Mulvany, whether or not you know the worth of a postdated check?

A. No, sir, I don't.

Q. Do you know whether it is as good as one which bears a [fol. 205] current date?

A. No, I don't. Wouldn't it depend on the signature?

Q. Assuming that, since we are talking about this check involved in this testimony, assuming that the signature was regular and the name of the payee was regular, the amount was regular, and there was nothing on the face of the check to disclose any invalidity but the fact that it was post-dated thirty days, do you know what effect that post-dating would have?

A. From my experience.

Q. Well, regardless of your experience, of your knowledge?

A. Well, I cashed a fourteen day post-dated check in a bank in Corpus Christi, myself.

Q. Did you do that without any pre-arrangement with the cashier?

A. It was by accident. I had two checks, and I cashed the wrong one.

Q. Is it your testimony that the Corpus Christi National Bank cashes your post-dated checks, as a regular thing?

A. It was the State National Bank.

Q. It was the State National Bank?

A. Yes.

Q. Is that your testimony, that they do cash your post-dated checks?

A. It is my testimony that they did it once.

Q. As a matter of fact, Mr. Mulvany, you know perfectly well that a post-dated check is no good?

A. I know that my post-dated check was good.

Q. But I am asking you, in the course of business?

A. Oh, I am not a business man.

Q. Have you had any business experience at all?

A. None.

Q. Notwithstanding that lack of business experience, you find yourself qualified to report business transactions, involving the tender or post-dated checks?

A. I don't understand the question.

[fol. 206] Q. I say, notwithstanding your lack of experience as a businessman, do you consider yourself com-

pletely qualified to report accurately business transfictions involving the tender of post-dated checks?

A. If you will take off the last three words there, I can tell you I am qualified to observe and report business transactions.

Q. I asked you concerning business transactions, involving post-dated checks?

A. Well, I am not a specialist, to that extent.

Q. The sum and substance of your testimony concerning post-dated checks, then, is what?

A. I still don't understand.

Q. Let me put it this way: Do you know anything about post-dated checks, generally, without reference to the one the State National Bank cashed for you?

A. That was my only experience.

Q. Outside of that, you know nothing about it?

A. That's right.

Q. Well, let me ask you this question, Mr. Mulvany: Did you ever, in your writings, at any time after the morning of Saturday, the 26th day of May, until you were cited in contempt by this Court, did you ever make any reference to the fact that that check was post-dated?

Q. In printed stores in the paper?

A. Yes.

Q. I don't believe so.

Q. I will ask you to be a little more definite. Did you or did you not?

Mr. Eckhardt: You mean by that,—I don't understand the question, whether you are calling it a post-dated check or what.

Mr. D'Unger: Let the reporter read the question.

(Thereupon the reporter read the question.)

[fol. 207] A. Don't these exhibits show? I don't recall.

Q. Well, the exhibits——

A. I have forgotten the date of the institution of the contempt proceedings, and I will say this, I have read through the Sunday and the Monday stories of the 27th and 28th of May, and I believe, my recollection is that there was no reference to any tender of a post-dated check in either of those two stories. Now, the trial ended on the 27th. During the course of the trial I believe I did not use your term, a post-dated check in any story I wrote.

Q. Now, let me ask you this: Isn't it a fact that in every story that you wrote about this matter, that you referred to the defendant Mayes as "Private Mayes," or "Private Joe L. Mayes, of the Army," or "Private Joe L. Mayes, now stationed at Camp Hood," or make some other reference to his Army service?

A. No, you have named all three references right there. That's a fact.

Q. Did you not make some reference to his Army service in every story that you wrote?

A. Yes.

Q. You did?

A. Yes.

Q. I will ask you whether or not you ever examined the record in that case?

A. You mean a transcript?

Q. I mean the record of the proceedings had, the pleadings filed and the transcript,—the transcript wasn't available, was it?

A. No, I didn't see the pleadings.

Q. Did you see the pleadings filed?

A. No.

Q. Well, let me ask you this, Mr. Mulvany: Did you ever, in your reportings of the proceedings had in this case ever mention Franklin Flato, Frederick Flato, Robert Flato or Dr. Harry G. Heaney as parties plaintiff in the case?

[fol. 208] A. No.

Mr. Eckhardt: If the Court please, the record speaks for itself. Are you just trying to test the witness' memory? Is that it?

Mr. D'Unger: No. If the Court please, there is nothing in the record about what he reported. We have stipulated they are parties plaintiff.

Mr. Eckhardt: You mean to say there is no stipulation that these publications were publications of the Corpus Christi Caller and Corpus Christi Times and Caller-Times, and the statement contain all the publications—the papers speak for themselves.

Mr. D'Unger: As I understand it, the stipulation is to the effect these exhibits are true and accurate copies of the papers published.

Mr. Eckhardt: "As a part of this stipulation, the following exhibits are referred to and made a part hereof,

just as if written herein." Then it starts in at C-26 and goes to C-31.

The Court: What page is that?

Mr. Eckhardt: Page 20. It is part of this record, all these publications.

Mr. D'Unger: Nothing in there as to what is reported and what is not reported.

Mr. Eckhardt: Except the publicasions themselves.

Mr. D'Unger: All right. I am referring to portions that are not in the publications.

Mr. Eckhardt: They speak for themselves. Go ahead; in the interest of time, I will waive it.

Q. Did you know that these people were parties plaintiff?

A. Not until their names were brought out in the testimony in the Court.

Q. Do you recall when their names were brought out in testimony in Court?

[fol. 209] A. Saturday, May 26th.

Q. Saturday, May 26th? That was when Mr. Jackson was testifying, was it not?

A. Yes, when he was being examined by Walter Lewright.

Q. Well, did you ever mention any of their names after that?

Mr. Eckhardt: We object. The publications are a part of the exhibits. If he is testing the witness' memory, I have no objection.

Mr. D'Unger: If the Court please, we charge these people with certain intentions and motives. I am trying to elicit a little information that will shed some light on their intention and motive and what their purposes in doing this reporting were.

The Court: Objection overruled.

Mr. Eckhardt: Note our exception. We make it only in the interest of time.

A. The answer is yes, anyway.

Q. Beg pardon?

A. The answer is yes.

Q. You say you did mention their names?

A. Yes.

Q. At what time?

A. I don't know that.

Q. In these publications?

A. Yes.

Q. I will ask you to show me in those exhibits wherein mention is made of their names?

Mr. Eckhardt: Whose names are you referring to, counsel?

A. The Flatos.

Q. The Flatos.

Mr. Eckhardt: The Flatos and Heaney?

A. Is it your point I mentioned those names during the trial?

Q. I asked you if you did in any of the publications com-
[fol. 210] plained of in the information, in other words?

A. Will this satisfy you? I believe I mentioned their names after the completion of the trial, before action on the motion for new trial.

Q. Well, I want your definite statement.

A. We haven't a complete file here.

Q. Beg pardon?

A. We have not a complete file here.

Mr. Eckhardt: That is a complete file.

A. No, there were other stories after the last one in here.

Q. Well, let me put it this way: Did you ever refer to these parties plaintiff at any time, from the first story that you ran on the 25th of May, until the completion of the hearing on the motion for a new trial?

Mr. Eckhardt: What date was that?

Q. I beg your pardon. Let me change that question,—from the first story that you run concerning the trial, until you were served with citation in contempt of this Court?

A. And what day was the citation served?

Q. On the 4th of June?

A. Yes, I think so.

Q. Well, tell me when and where?

A. Well, our file here only goes to June 1st.

Q. Well, then; the trial was over——

A. On the 27th,——

Q. —on the 27th?

A. —of May.

Q. The motion for new trial was filed when?
A. I don't know.

Mr. Eckhardt: It was filed the 28th.

Q. Well, let's put it this way: Did you make any reference, these exhibits are the publications complained of in the information,—did you make any mention of those peo-
[fol. 211] ple as parties plaintiff in this action in either of the publications on those dates?

A. I think not.

Q. Those are the publications complained of in the information?

A. (Witness examining newspapers).

Q. Well, Mr. Mulvany, just to save a little time, if you made any mention of them, it would be in there, would it not?

A. If it was between these dates, yes.

Q. And if you didn't, why, it is not in there?

A. It would not be in there, no.

Q. Well, assuming it was not in there, why did you not make mention of their names?

A. What names?

Q. Of the three Flatos and Dr. Harry G. Heaney?

A. They had no part to play in the trial. They did not appear at any time during the trial, and the testimony was that Bush M. Jackson was the manager of the property.

Mr. Eckhardt: It is stipulated in the stipulation they were parties to the suit.

A. We referred to Bush M. Jackson as agent of the building.

Q. As agent of the building?

A. Yes.

Q. But you didn't refer to him as agent for the Flatos and Dr. Heaney, did you?

A. Not during these dates.

Q. It is stipulated here, Mr. Mulvany, that this petition is the petition filed originally in Justice Court, was later re-filed in the County Court, and I will ask you to tell me whether or not those names do appear in there as parties plaintiff?

A. Those names appear in this stipulation, yes.

Q. Well, they also appear in the original petition, do they not?

A. They probably did. I never saw the original petition.

Q. You never saw the original petition?

A. No.

[fol. 212] Q. But you heard this testimony concerning Dr. Heaney and the Flatos?

A. Yes.

Q. Notwithstanding that, you didn't publish their names?

A. I heard the testimony, and did not publish their names, right, at the time.

Q. I will ask you whether or not Dr. Heaney isn't a prominent local physician.

A. I have heard his name.

Q. You know nothing of his prominence or reputation?

A. No.

Q. Are you acquainted with the Flatos?

A. No. I have seen them, but they don't know me.

Q. I will ask you whether you have any knowledge of whether or not they are an old and prominent family here?

A. I have not, no; I only heard that.

Q. Well, do they have that reputation?

A. That's about what I have heard.

Q. It didn't occur to you to check the record to see whether or not they were parties to this action?

A. The testimony of the plaintiff, and the only one that appeared at the trial, he instituted this action of his own, and without the knowledge of his associates.

Q. Well, did you hear the testimony of the plaintiffs' witness, Ben Vaughan?

A. Oh, yes.

Q. Did you hear him testify that two of the Flato boys had come to his office to discuss this matter?

A. My recollection is that he said one.

Q. Well, one or two, whatever the record shows.

A. Yes.

Q. And you didn't publish anything concerning that?

A. No, I didn't use Mr. Vaughan's testimony.

[fol. 213] Q. Why didn't you use Mr. Vaughan's testimony?

A. In my judgment, it wasn't particularly newsworthy. I have a great mass of testimony and great mass of notes.

Q. Well, now let me ask you this: Didn't you, as a reporter, play this thing up rather sensationally?

A. I don't understand.

Q. Didn't you give it a rather sensational play, from a news angle?

A. I don't give the story the play,—I write them.

Q. Well, didn't you devote a good deal of space to it, write it at considerable length?

A. Oh, yes.

Q. Why did you do that?

A. In my judgment, it was newsworthy.

Q. And you were relying on your judgment?

A. Oh, yes.

Q. And not on the record?

A. Just a minute. I don't believe there is any necessary conflict between my judgment and the record.

Q. You just admitted you didn't run Mr. Vaughan's testimony.

A. I am not a stenographer. I don't run everything. We could run the transcript in.

Q. So, it is your testimony you only ran what you considered newsworthy?

A. That's right, in this and all other trials.

Q. And you didn't consider that newsworthy, but you did consider newsworthy hearsay testimony to the effect that a witness for the plaintiffs was operating marble tables and gambling places and rackets?

A. That was an incidental part of the story, and so handled, and it was newsworthy, because the Judge brought that testimony out over the objection of counsel for both sides. It was an unusual procedure.

Q. In other words, did you report that as though the [fol. 214] Judge was investigating that angle of the thing himself?

A. Oh, yes, and the Judge gave me a hint during the recess that he regarded it as such, too.

Q. Well, is it your testimony now that this testimony regarding this gambling and reacketerring and what not had any bearing on any issue in the case on trial?

A. I first mentioned this testimony regarding pin ball and marble tables and so on way down in the story of Sunday, of the 27th, and dismissed it finally as being hearsay, under the witness' own testimony, on his own statement.

Q. But you run all of it before you dismissed it?

A. Oh, no, I didn't run all of it by any means.

Q. You ran the newsworthy part of it, though?

A. Yes, sir, some of it; there was a good deal of that testimony about racketeering which I did not use.

Q. Well, now, how long have you been a newspaper man, Mr. Mulvany?

A. For nineteen years.

Q. And it is your testimony here that you played up the——

A. No, it is not.

Q. That you wrote up, we will say, the more newsworthy phases of this trial?

A. Within the scope of my judgment.

Q. And in your judgment as a newspaper man, with nineteen years' experience, wouldn't the fact that a prominent physician and three members of an old and prominent family were involved in a case involving gambling and rackets be much more newsworthy than the fact that it was merely one of the witnesses who was testifying for the plaintiffs?

A. You are not correctly stating the facts used in seeking what news is relevant.

Q. All right, what are the facts?

A. I didn't see anywhere in the testimony where the name of a prominent physician or the name of any prominent [fol. 215] family were associated with gambling and racketeering. Both the attorneys objected to the introduction of that evidence.

Q. Well, you knew who these people were, didn't you?

A. Through hearsay.

Q. Well, wasn't your knowledge such as to lead you to believe that they might be prominent?

A. I had no knowledge of my own. I told you all I knew about these people was what I had heard.

Q. And didn't you, as a news hog, sense a sensational story there, when these names were brought into this trial, where this sensational——

A. Jerry, I don't write sensational stories. I write factual stories.

Q. Well, that is the point at issue here, Mr. Mulvany, whether this is factual or not.

A. Well, I don't agree with you.

Q. Mr. Mulvaney, I refer you to the Caller-Times for Sunday, May 27?

A. Yes, sir.

Q. On your front page under a two column head "Jury Defies Order by Browning for Directed Verdict," take the other page of the exhibit, page 8, and on the first column on the left hand side just above "The Issue," you will find this paragraph: "Tales of threat to the person and property of at least one witness were heard and denied; stories of underworld activities involving allegations of gambling rackets were unfolded and to such an extent that the issues in the case were frequently obscured by the revelations."

A. They were to me.

Q. Just what did you have reference to?

A. The testimony of Floyd F. Burchard.

Q. Floyd F. Burchard?

A. Yes.

Q. And that is the testimony that you finally admit here you say as hearsay?

A. Yes. You can read a little lower and see that it is.

[fol. 216] Q. If it was hearsay what prompted you to write this?

A. The Judge brought it out.

Q. Well, I know, if it was hearsay——

A. It wasn't hearsay in the court room. It was testimony in the court room.

Mr. Eckhardt: I think this has developed into an argument between the witness and counsel. I think the record will show the testimony was adduced and after it was adduced it was moved to be stricken out and part of it was stricken. It still became part of the proceedings in the case. It was in open court and everybody heard it.

The Court: Objection sustained.

Q. One of these stories, Mr. Mulvaney, lets go back to this same exhibit, the front page for May 27. The lead on that story is, "A jury with a conscience last ni-t refused to find a verdict in accordance with instructions handed down by Judge Joe D. Browning in County Court, concluding a trial that began Friday afternoon." Where did you get that information the jury had a conscience?

A. The jury so described itself. It described itself as stated.

Q. This story doesn't read jury self anointed?

A. The jury described itself as a jury with a conscience. You just read it.

Q. But this is your statement?

A. I wrote the story, yes.

Q. You didn't qualify it with the fact it was the jurors' own description of itself?

A. Read down a little.

Q. I am referring to that particular paragraph.

A. That is only one paragraph in the story. It qualifies itself later. I believe on the next page; oh, no, it is on the same page, this quotation of the foreman, A. D. Kirk, "When we have a unanimous vote do we have to go by the instructions against our conscience?" That is the statement.

[fol. 217] Q. You didn't ascribe it to Mr. Kirk?

A. I think you will call that the lead; that was such an involved story it had a long lead.

Q. I will ask you to refer to the Caller for May 28. Your fourth paragraph there reporting the remarks of Mr. Lewright to the jury, some two paragraphs in which he congratulates the jury on their courage and integrity and make a reverent reference to God——

A. That is the language of Mr. Lewright.

Mr. Eckhardt: I appreciate his feeling in the matter, but I think he should confine his statements to what was said.

Q. Now on the jump page on that same story——

A. Yes, sir.

Mr. Eckhardt: Is that the third page of that Caller?

Mr. D'Unger: Yes, on the page.

Q. Now, the last portion of that story you quote Mr. Lewright that at some length. About how many words do you estimate that as being?

A. About 330.

Q. About 330 words, and you stated a while ago you were not a shorthand reporter, didn't you?

A. That is correct.

Q. This what Mr. Lewright said to the jury?

A. Yes.

Q. How did you manage to reduce this to writing with any degree of accuracy?

A. Just by taking notes as I told you, and checking with the speaker and asked him to fill in blanks upon which we sat down at the typewriter and he gave it to me all over again.

Q. This was after the jury had been directed to return to the jury room at about 9:00 o'clock on Sunday morning?

A. And Mr. Lewright before their return to the jury room made this address in which he urged the jury to sign the verdict.

[fol. 218] Mr. Eckhardt: If referring to the address on page 3, May 28 in the Caller, I don't think the article says it was before the jury went out.

Mr. D'Unger: I believe if you will refer to the paragraph just above——

Mr. Eckhardt: Is it the second or third time the jury went out.

Mr. D'Unger: This was the——

Mr. Eckhardt: Last time.

Mr. D'Unger: First time they had been back in Sunday morning.

Mr. Eckhardt: That is all right.

Q. I will ask you whether or not Mr. Tarlton addressed any remarks to the jury at that time?

A. I believe Mr. Tarlton did.

Q. But you didn't report Mr. Tarlton's speech?

A. For this reason: Mr. Lewright was counsel for the defendants and it was highly unusual in my judgment for the counsel for the defendants to address himself to the jury asking them to return a verdict against him.

Q. As a matter of fact, don't you think it was just a little bit unusual for the attorney for any one to address a jury while they were deliberating?

A. Yes, I do. It was done with the permission of the Court however.

Q. Well now, in several places you quote Mr. Lewright verbatim?

A. Yes.

Q. Do you recall quoting anything Mr. Tarlton said verbatim?

A. Yes.

Q. Where?

A. I believe in this same story here you will find both, words spotted all through with quotations of both Mr. Lewright and Mr. Tarlton.

Q. Well, I would like for you to show me one quotation [fol. 219] containing as much as a hundred words?

A. My recollection is he didn't talk as much as Mr. Lewright.

Q. For that reason you didn't report him as voluminously.

A. I don't get that.

Q. I say for that reason you didn't report him as voluminously?

A. He might have said something that was less newsworthy.

Q. In other words, all through this thing we run into this newsworthy angle?

A. Oh, yes. That is my business.

Q. And as a newspaper man of nineteen years experience it is your well considered opinion that any facts in a proceeding in any court because of its newsworthiness is more important than the rights of any litigant involved in a proceeding?

A. How would I know the rights of litigants. I write what I see and hear. I don't write opinion or editorials. I write news stories.

Q. If you know nothing about the rights of litigants——

A. I write stories telling how the rights of litigants are adjudicated by the courts.

Q. If the procedure and adjudication in your judgment is sufficiently newsworthy you write it?

A. Oh, yes. Many trials we don't have anything about, such as divorce trials; they are routine, yet they involve the rights of litigants.

Q. Do you know on what grounds the defendants' motion for an instructed verdict in this trial was based?

A. No.

Q. Do you know on what grounds the plaintiffs'——

A. The defendants', did you say first?

Q. At first I asked you as to the defendants' motion for an instructed verdict?

A. Yes, sir, I recall a little while ago; there was a ninety minute argument for an instructed verdict.

[fol. 220] Q. Do you know the grounds for the motion?

A. Yes, sir.

Q. What were they?

A. Very briefly, that the plaintiffs had no case.

Q. Well, that is that. Mr. Mulvaney, what were the legal grounds?

A. Why should you go to all of that?

Q. Because that would not constitute——

A. That they legally had no case.

Q. You don't know what the legal grounds were?

A. Yes, as explained by Mr. Lewright in his argument the law was on the side of the plaintiffs if they wished possession, the defendants if they wished to exercise their option, merely have to give notice and if they failed to pay the proper amount then they became liable to law suit for the difference and didn't become subject to loss of the lease. I think that is the subject for Mr. Lewright's argument. Of course, he quoted from case after case in the state which stated the same thing.

Q. You examined the contract?

A. No, I never saw it. It was read frequently during the trial.

Q. You know whether or not the provision in the contract was the simple giving of notice?

A. I didn't get that question.

Q. I asked him whether or not he knew, whether he knew if the provision in the contract for the exercise of the option was simply the giving of notice?

A. I can say I know that.

Q. Do you know what the plaintiffs' motion for an instructed verdict was based on?

A. No. It wasn't argued in the court.

Q. Did you look at the record to see what it was?

A. It wasn't argued in court. I didn't look.

Q. You didn't look?

A. No. It wasn't even read in the court. It was presented during recess.

[fol. 221] Q. You don't know whether the Judge read it or not?

A. No, I don't.

Q. You don't know what the grounds were?

A. No.

Q. So you have no way of determining the relative merits of the defendants' motion and the plaintiffs' motion?

A. Neither did the jury.

Q. I am not questioning the jury yet, Mr. Mulvaney?

A. I know as much about the plaintiffs' motion for an instructed verdict as the jury did.

Q. I asked you if you knew?

A. No.

Q. Now, Mr. Mulvaney, you refer to that motion one time in "quotes" as a one page motion?

A. Yes, I believe I did.

Q. What was the purpose of that?

A. It was so described by the defense counsel; that is why the quotes.

Q. Did you place all of the counsel's remarks in quotes?

A. Where I was sure of their quotations, yes.

Q. In that particular instance?

A. I am sure he said so, yes.

Q. I am sure you didn't. Do you know about how long the defendants' motion was in that trial?

A. I don't recall. However, it was longer than the other.

Q. In your reporting as a rule do you give the number of pages in any given motion as to the size of it?

A. Not always.

Q. Do you know what the usual size of a motion is?

A. Roughly could be from five to ten pages.

Q. You don't remember a one page motion?

A. Oh, yes, I saw one in this trial.

Q. Now, Mr. Mulvaney, I will ask you to take the Caller for May 29th. Did you write that story?

[fol. 222] A. Did we stipulate that?

Mr. Eckhardt: Yes.

A. I think I did.

Q. You reported here that representatives of seven ex-service men's organizations in Nueces County are scheduled to meet tonight to act on a resolution requesting that County Judge Joe D. Browning grant a new trial in the Playboy case. Directors of the Veterans Council, representing 1231 members of the ex-servicemen's groups announced last night the resolution will petition that Judge Browning "let the issues rest with the jury." Directors of the Veterans Council said last night their organization represents three American Legion Posts in Nueces County, including two in Corpus Christi, two veterans of Foreign Wars posts; one Disabled American Verterans post and one Spanish American War Veterans post. I will ask you if you found that information in the record in the Mayes case?

A. Why, of course, not. This was after the record was closed.

Q. It was after the record was closed?

A. Surely. It has nothing to do with the record.

Q. A motion for a new trial was still pending?
A. Yes, I believe so.
Q. So the record wasn't closed?
A. The record in the Mayes trial was closed.
Q. The motion for a new trial was pending?
A. Yes, but that was not part of the trial.
Q. You didn't get that out of the record?
A. Very obviously; it doesn't say it came from the record.
Q. Where did you get that from?
A. From representatives of the Nueces County Veterans Council.
Q. Do you mind telling who they were?
A. Aubrey Daly, Lester Wolford and I believe Frank Bonner. I may have talked to others, but I'm not sure.
Q. And were you present when that resolution was adopted?
[fol. 223] A. By the time this story was written, this doesn't say the resolution was adopted.
Q. It says they are scheduled to meet that night?
A. Yes, sir.
Q. I will ask you to take your paper for the Caller for the 31st.

Mr. Eckhardt: 31st?
Mr. D'Unger: 31st.
Mr. Eckhardt: Yes.

A. I haven't it here.

Mr. Eckhardt: Yes, it is.

A. I see.
Q. Do you have it there?
A. Yes.
Q. That story reads in part, "Three local groups were reported last night to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy ouster suit." Where did you get that information, Mr. Mulvaney?
A. Just a minute. I got that from an attorney representing these organizations.
Q. Do you mind telling us who that attorney was?
A. Ordinarily I would, but I have received permission to use his name. It was Samuel I. Pittman.

Q. You didn't get that information out of the record in the Mayes case?

A. I just told you I got it from an attorney representing these organizations.

Q. Now this refers to one petition reportedly being drawn by the Parent-Teachers, another the Service Mothers group and a third for independent circulation among parents of men in service. Did you get that from any record in the Mayes case?

A. That just came from the same attorney.

Q. Then, "The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi [fol. 224] Soldier's and Sailor's Advisory Council Tuesday night. This petition called upon Judge Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under another judge and jury. Action on the petition is expected shortly." You didn't get any of that information out of the record in the Mayes case, did you?

A. I got that from the attorney.

Q. Did you get this information regarding the Veterans Council petition from the record in the Mayes case?

A. No, I said I got that from three members at least of the Veterans Council.

Q. I will ask you to take the Times for May 30 and see a paragraph there says, "Judge Browning unavailable for Comment on Case," "Judge Joe D. Browning could not be reached today for comment on the resolutions adopted last night by the Corpus Christi Veterans Council, condemning his directed verdict in County Court as 'a gross miscarriage of just- against a member of the armed forces of the United States. Where did you get that language, "a gross miscarriage of justice"?

A. Will you notice that is in quotes.

Q. You didn't find it in the record of the Mayes case?

A. I found it in the motion and it so states here. Let me make this clear for you, Mr. D'Unger. We don't write only from the record of the Mayes case. We have lots of other stuff in here that didn't come from the record in the Mayes case.

Q. You say you didn't write from the record in the Mayes case?

A. I say the whole page. This story is about a resolution, not about the Mayes case.

Q. It is pretty well tied into the story about the Mayes case?

A. Oh, yes, yes.

Q. And you were writing from other sources whether a case is pending trial and adjudication in any court in this county or not?

A. Every time a petition is filed in the District Clerk's office we write the story from the plaintiff's side alone [fol. 225] with all of the allegations against the defendant but never heard any criticism along the line before, yet it is a one-sided story. It is news if the case is filed and very often we don't write anything from the defendant's answer when it is filed. We wait until it is tried.

Q. Now, Mr. Mulvany, I will ask you to take the Times for May 29th, the jump page.

Mr. Eckhardt: The jump page. You mean page 8?

Mr. D'Unger: Page 8.

Q. You have there a paragraph beginning, "An aroused group representing the county's seven veterans' organizations with a membership of 1121 * * *". Where did you get that information there were 1121 members?

A. Well, there is more than that, 1231. This must be a misprint.

Q. You didn't get that number of members out of the record in the Mayes case?

A. Oh, no. I don't believe the record would show anything about the membership of the veterans' organizations in the Mayes case.

Q. Now here this last three paragraphs, "Meanwhile Browning ran into new difficulties with his forcible detainer judgments, when William L. Scarborough filed a motion for a new trial in the suit of Mrs. L. M. Baskin against Mr. and Mrs. John B. Miller for possession of a dwelling at Upper Broadway and Buffalo Streets. Browning entered a default judgment yesterday for the plaintiff represented by T. S. Cyrus. The case had been appealed from Jack Southerland's Court where the defendants won the verdict. Scarborough's motion alleges that the defendants were uninformed as to the appeal and had no knowledge they were required to appeal and defend themselves."

Mr. Eckhardt: This is outside of the information and outside of the decree nisi and not a material or relevant issue in this particular case.

Mr. D'Unger: If the Court please, it is in the publication [fol. 226] which are filed and we have stated that they are to be considered in the information in their entirety. This is a portion of one of those.

Mr. Eckhardt: I will withdraw the objection.

Q. Just what were those rights you had reference to, Mr. Mulvany?

A. It appears from the language of the motion that the judgment was entered against the defendants who hadn't been summoned.

Q. And what connection did that have with the Mayes case?

A. It doesn't say here it had any connection.

Q. Well, it is in the same story, isn't it?

A. But that doesn't necessarily follow that it is connected with it. It names new plaintiff, new defendants and new attorneys.

Q. Let me ask you if this doesn't connect up: "Meanwhile Browning ran into new difficulties with his forcible detainer judgments * * *"

A. Don't you have to assume a lot to get that.

Q. Not necessarily?

A. It doesn't.

Q. It says that——

Mr. Eckhardt: I think the witness and counsel are in argument.

Mr. D'Unger: That is entirely true. It is almost impossible to refrain from arguing with him.

Q. Did you or did you not mean the Mayes judgment?

A. I think it is very clear. I mean judgments, plural.

Q. If you had mentioned judgment——

A. Possibly.

Q. Well, don't you know?

A. It still says judgments. It doesn't say a judgment or Bush Jackson and Joe Mayes judgment.

Q. You mentioned it, didn't you?

A. I did.

Q. You still don't know.

A. I'm not saying I don't know.

Q. You mentioned it. What did you mean?

[fol. 227] A. Judgments. Just what I said and not a particular judgment.

Q. Mr. Mulvaney, you heard Mr. Jackson testify that Mr. Robert Flato, one of the plaintiffs in this case——

Mr. Eckhardt: Mr. McCracken, Not Mr. Jackson.

Mr. D'Unger: In the Mayes case, Bush Jackson.

Mr. Eckhardt: Oh, I beg your pardon.

Q. You heard Mr. Jackson testify that Mr. Robert Flato was in the army, didn't you?

A. Mr. Robert Flato?

Q. Yes.

A. Yes, that he was a Lieutenant.

Q. Why didn't you mention that fact?

A. He wasn't present at the trial and Jackson wasn't sure he knew of the suit.

Q. Well, does a man have to be present at a trial in your opinion before what he is doing is newsworthy?

A. Now, just a minute. What he is doing is fighting as a Lieutenant. That probably would be newsworthy in some other story.

Q. If Mayes had been off fighting as a private would you have omitted his name?

A. Mr. Mayes?

Q. Yes, Joe.

A. Oh, the defendant.

Q. Yes, the defendant Mayes?

A. He was present.

Q. Had he not been present would you have omitted his name from the proceedings?

A. Purely hypothetical. That situation didn't arise.

Q. You heard Mr. Burchard testify that upon learning of the rent, in order to exercise the option in that lease would have to be increased from $250.00 to $275.00?

A. I heard Mr. Burchard testify.

Q. That he had learned of that fact?

[fol. 228] A. Yes.

Q. Did you hear him testify that when he learned of that fact he immediately offered to pay the $25.00?

A. Yes.

Q. Did you hear him further testify on cross examination that while he didn't get the money out of his pocket and lay it on the desk, he just said, "I will pay it"?

A. His testimony was this: That he had offered to pay it and that he was told: "We don't want it," and my understanding is the law doesn't require you to make a futile gesture, but he didn't testify whether he had his hand in his pocket. He offered to pay it, and I think that is not controverted. Jackson admitted it.

Q. Just a moment. We will get to that since you have mentioned it. I hand you exhibit A. You published that fact that Burchard had offered to pay that $25.00?

A. Yes, I did.

Q. This is exhibit A, page 158, and I will ask you to read from line 9——

A. Whose testimony is this?

Q. Vaughn's.

A. Vaughn's.

Q. Yes, read from line 9 to line 12 there.

Mr. Eckhard: Page 158.

A. 9 to 12. I have it. Cross examination of Ben Vaughn by Mr. Lewright. "Q. Didn't he offer to pay you the additional $25.00? A. It isn't so. Q. You deny that? A. I deny it absolutely." That is Mr. Vaughn's testimony, not Mr. Jackson's.

Q. That was Mr. Vaughn's testimony and that was a denial of Mr. Burchard's testimony, wasn't it?

A. Correct.

Q. But you didn't publish that, did you?

A. No, I didn't use any of Mr. Vaughn's testimony.

Q. You didn't think that Mr. Vaughn's denial was newsworthy?

[fol. 229] A. No, I didn't think it was correct.

Q. Oh, you didn't think it was correct?

A. No.

Q. What gave you that impression?

A. Because of some other statements he made under direct examination he retracted under cross examination.

Q. In other words, you weighed that evidence?

A. Yes, sir. I did for its news value only.

Q. Just as it should be valued in your practice regardless of how you adjudged it to be newsworthy?

A. That is right.

Q. Now, you have weighed evidence and adjudged it to be not correct in your opinion?

A. That is one point only because——

Mr. D'Unger: Let me finish my question.

A. Pardon me.

Q. Now, with those facts in mind let me ask you if it was your intention in reporting this matter to usurp the province of the Judge and the jury in the case?

A. Of course not.

Q. Now, you heard Mr. Burchard's, Mr. Vaughn's testimony as to the presence of the two Flato boys or one boy in his office, didn't you?

A. Yes, one, I think. I'm not sure of that.

Q. Well then the transcript shows two. As a matter of fact you also heard Mr. Jackson's testimony to the effect that the Flatos and Dr. Heaney were the owners of that building?

A. Owners and uninformed of the suit.

Q. And you heard Mr. Vaughn's testimony that one or two of the Flato boys had been in his office discussing the matter?

A. Prior to the suit, yes.

Q. Prior to the suit, and notwithstanding that fact you didn't publish their names?

[fol. 230] A. There is the record.

Q. Well, I will ask you why you didn't publish those, because you didn't judge them newsworthy?

A. I believe that is what I said. They weren't present, had no knowledge of the suit; they weren't in active participation in the suit. They didn't testify. If I mentioned them it would have been merely in passing.

Q. How long have you been covering courts, Mr. Mulvaney?

A. Here?

Q. Throughout your nineteen years experience?

A. Oh, I believe since about 1929.

Q. As a matter of fact you have covered some pretty big cases in your experience, have you not?

A. I have covered several, yes, sir.

Q. Have you always omitted any mention of litigating parties who weren't present in the court room?

A. No, I have selected what I thought was newsworthy.

Q. You have always used your own judgment?

A. That is right.

Q. Now, let me ask you this: Were those stories as you wrote them in your opinion as a newspaper man of nineteen

years experience calculated to obstruct the administration of justice?

A. I didn't write them with any thought of their impact. I didn't write them with any intention of creating public opinion one way or the other, but was writing just what occurred.

A. You had no thought of the consequences that might flow therefrom?

A. No, not at all.

Q. As——

A. I rather imagines they would be read. That is all.

Q. You imagined they would be read?

A. Yes, sir.

Q. So they were not really just arrows at random?

A. Oh, no.

Q. As a matter of fact you had an idea you would compel [fol. 231] the Judge of the court to change his decision?

A. I had an idea only of publishing fact and giving a thumb nail sketch of what happened.

Q. If in your opinion they had been calculated to affect the course of justice would you have written them?

A. I don't indulge in opinions. I write my facts as I see them.

Q. This presentation of the proceedings had in the Mayes case is your opinion of a fair, accurate and impartial presentation of those proceedings?

A. Now, fair, I will stand on that, yes.

Mr. D'Unger: Thank you. That is all.

The Court: We will recess until 9:30 in the morning.

(Whereupon Court recessed for the day until 9:30 o'clock A. M., August 2, 1945, at which time trial of the cause proceeded as follows:)

STIPULATION

Mr. D'Unger: It is agreed and stipulated, by and between counsel, that the Corpus Christi Caller, the Corpus Christi Times, and the Corpus Christi Caller-Times, are sold in and around the Nueces County Courthouse, and that on the 25th and 26th days of May, the said Corpus Christi Caller and Corpus Christi Times were so sold in and around the Courthouse shortly after their publication, and that this stipulation shall constitute a part of the record in this cause.

Mr. Eckhardt: Yes, sir, it is agreed to and stipulated in open Court, by both counsel.

[fol. 232] Thursday, August 2nd, 1945

Mr. D'Unger: The Court please, I would like to ask Mr. Mulvaney just one or two further questions.

TOM MULVANEY, one of the Respondents herein, having been previously sworn, thereupon testified further on

Direct examination.

By Mr. D'Unger:

Q. State your name, please?

A. Tom Mulvany, M-u-l-v-a-n-y.

Q. You are the same Tom Mulvany who was testifying when Court recessed yesterday?

A. The same one.

Q. Mr. Mulvany, in substance, you testified that in reporting proceedings in pending cases, you did not confine your sources of information to the record in the case; is that correct?

A. I don't believe I so testified.

Q. Wasn't that the substance of your testimony?

A. No, I don't believe that's so, either.

Q. Well, now, let me put it this way; didn't you testify that you didn't write exclusively from the record in the case?

A. I didn't testify to that, either.

Q. Do you recall your testimony?

A. Yes.

Q. Well, would you mind repeating it?

A. That testimony was elicited on numberous questions; "was this from the record?" and "was this from the record?" and so on. But I don't have access to the record until after the case is closed.

Q. You didn't testify then, that you didn't confine your writings exclusively to the record?

A. Please?

[fol. 233] Q. You did not testify that you did not confine your report to the facts disclosed by the record in pending cases?

A. Well, now, that double negative is throwing me—I did not testify that I did not confine myself——.

Q. Well, now, I am no grammarian, but I don't think that double negative charge is justified—well, we won't argue about it; strike that, Mr. Reporter. Mr. Mulvany,—Mr. Reporter, will you go back to Mr. Mulvany's testimony; did you report that?

Reporter: No, sir.

A. That transcript of that trial wasn't ready until weeks after the trial. I confined myself to my record of the trial.

Q. You confined yourself to your record of the trial?

A. That's right; of the proceedings.

Q. And your record of the trial included the proceedings had at the various organization meetings, and the passage of the various resolutions condemning the County Judge, is that right?

A. That had nothing to do with the trial; was no part of the trial. That is something outside the Courtroom entirely.

Q. Didn't you report those organizational proceedings in connection with the trial?

A. Not in connection with the trial; subsequent to the trial.

Q. You reported them in the same stories, however?

A. No, after the trial they were reported.

Q. Didn't you report then what had gone before in the trial, in the same stories?

A. What was that question?

Q. Did you not report, at the time of reporting the activities of these organizatons, did you not give a summation of what, in your opinion, had taken place at the trial?

A. What in my recollection had taken place at the trial, yes.

Q. And you testified yesterday that you only reported those phases of the proceedings had in any causes pending in any Court, those things that were, in your judgment, newsworthy, is that right?

[fol. 234] A. Yes.

Q. I will ask you whether or not you ever reported and caused to be published, or did publish, the fact that the witness, Burchard, was the right-hand man of one of the biggest marble table operators in this county?

A. You ask if I reported that?

Q. Yes?

A. I have no recollection of reporting that.

Q. As a matter of fact, you didn't report it, did you?
A. As a matter of fact I never heard that said until now.
Q. That was outside your knowledge at that time?
A. And except for your statement, it is now.
Q. You had no knowledge that Mr. Burchard was the business representative and accountant for Mr. Henry E. Elliott, with the Southern Amusement Company?
A. I believe you told me that during the trial, and I had forgotten it.
Q. I believe your memory is accurate on that, Mr. Mulvany. Do you recall at what point I told you that?
A. In the corridor, outside the Courtroom, Saturday afternoon, May 26th, I believe.
Q. You never made any investigation to determine whether or not my statement was true or false?
A. No, it had nothing to do with the trial, as far as I was concerned, and furthermore I thought you were an interested party.
Q. What gave you the idea that I was an interested party?
A. Your various comments to me about the way I was handling the stories. It was evident you didn't like the way I was handling it.

Mr. Eckhardt: The Court please, I think this is getting to the state of an argument between the witness and counsel——

Mr. D'Unger: The Court please, I have addressed noth-
[fol. 235] ing but questions to the witness.
Mr. Eckhardt: Well, go ahead, if you want to develop that, alright. I just wanted to shorten the record.

Q. You did see fit, though, to publish the fact that Mr. Burchard testified at great length concerning the gambling and marble table activities of the witness, Doc Mason, did you not?
A. Please, again?
Q. You did see fit to publish at some length the testimony of Mr. Burchard in connection with the marble table and gambling operations of Doc Mason, did you not?
A. I think if you will compare what I wrote with the transcript of that trial, you will find that I brushed off Mr. Burchard's testimony concerning Doc Mason's marble table operations very, very briefly.

Q. That is your opinion?

A. I suggest that you consult the transcript and form your own opinion.

The Court: Just a minute; I didn't get that. Will you read that?

Reporter: (Reading) "'I suggest that you consult the transcript and form your own opinion.''

Q. Mr. Mulvany, you testified that you had been in the trial throughout its entire length, with the possible exception of some five minutes?

A. About that, yes.

Q. Can you give us any idea how well attended that trial was?

A. Yes, as trials go, I think it was very well attended.

Q. Can you give us some idea, in numbers, about how many people were there?

A. Well, that would be difficult, because—well, there were certainly many attorneys coming in and going out, you among them, and many other persons coming in and sitting down for an hour or so, and then leaving, while others took their places. I wouldn't hazard a guess how many there were.

[fol. 236] Q. Let me ask you again, did you ever see me at the trial of that thing on the merits?

A. Just what do you mean by that? I saw you there, yes.

Q. At the trial?

A. Yes; I talked to you at the courtroom during the trial, and during the recesses—you talked to me.

Q. Can you give us some idea, Mr. Mulvany, about how many people were there?

A. No, I——

Q. Well, were there five there?

A. Many more than five.

Q. Well, were there ten there?

A. There was never a time when there were not more than ten there.

Q. Were there a thousand there?

A. Of course not.

Q. Well, let's get it down——

A. Well, why not say between ten and a thousand.

Q. There's a little too much latitude there. Were there five hundred there?

A. I would say that's a little heavy.

Q. Were there two hunderd and fifty there?

A. Yes, I should say so.

Q. I mean at any given time?

A. Oh, no, no; I don't believe the courtroom would hold that many.

Q. Were there as many people as there are in this courtroom now, at any given time?

A. Many times, more.

Q. You mean that there were many times more persons, or that many times there were more persons?

A. I said there were many times when there were more persons in there.

Q. Do you recall whether Les Wolford was ever in the courtroom?

A. If he were, I didn't see him.

[fol. 237] Q. Do you ever recall seeing Frank Bonner there?

A. I don't believe so.

Q. Do you ever recall seeing Aubrey Daly there?

A. I was confining myself to watching the witnesses and listening to the witnesses, and in taking notes. Undoubtedly there were many persons there whom I did not see.

Q. I will ask you if there was any other publication or periodical that had a representative there reporting the events that transpired?

A. Of my own knowledge?

Q. Yes?

A. I don't know.

Q. Did you ever see any other—did you ever see a report of those proceedings carried in any other local periodical?

A. We have no other local periodical.

Q. We have no other local periodical?

A. No.

Q. No weeklies, or other dailies?

A. No. Oh—I have heard—that's right.

Q. Well, now, Mr. Mulvany, as a newspaper man of nineteen years experience, what was the greatest factor in the formation of public opinion in connection with the trial of the Mayes case?

A. As a newspaper writer of nineteen years experience, I couldn't answer that question.

Q. During your nineteen years as a newspaper man, you have formed no conception of the part that a newspaper plays in the molding of public opinion?

A. I imagine that any reader of a newspaper forms his opinions from the facts that he reads.

Q. And how many readers does your newspaper have; approximately, of course?

A. I don't know.

Q. Do you know what your daily circulation is, on the Caller, say?

[fol. 238] A. No; I don't.

Q. Do you know what your daily circulation is on the Times?

A. No, I don't know that.

Q. Do you know what your daily circulation is on the Caller-Times?

A. No. I will guess at it, but I don't know.

Q. Well, give us your best estimate.

A. Probably fifty thousand.

Q. Do you know what the basis is for calculating the number of readers——

A. No.

Q. —per circulation?

A. No.

Q. And your statement is that there are no other publications or periodicals——

A. Yes, I recall that there is a daily newspaper here, or it is called such. It is a publication that rolls every day, or is dated on consecutive days. I don't know what it amounts to.

Q. Did you ever see one of them?

A. Yes.

Q. Well, is the—are the newspapers published by the Caller-Times Publishing Company the principal newspapers published and circulated in this area?

A. I should say so.

Q. And you are not prepared to state what effect the publication of your news stories, circulated in fifty thousand copies of your newspaper, would be on public opinion?

A. No.

Q. Mr. Mulvany, did you report this cause of B. M. Jackson, et al., vs. J. L. Mayes, et al., when it was tried in the Justice Court?

A. I did.

Q. How much space did you devote to it?

A. Oh, I wrote probably five hundred words on a morning hearing in Justice Crow's Court.

[fol. 239] Q. Do you recall the issue of the paper—which paper that appeared in?

A. My recollection is it was Thursday, May 3rd, in the Times.

Q. Could you secure a copy of that paper for us?

A. Yes, I could.

Q. Will you do it?

A. When do you want it?

Q. Any time before the conclusion of this——

A. Yes, I will.

Mr. Eckhardt: Well, let's get this now; we will never get through here that way; you will have more cross-examination then——

Mr. D'Unger: There will be no cross-examination on that. I would like just to introduce that copy.

Mr. Eckhardt: Well, of course I will have to object to it.

Mr. D'Unger: If you will agree to furnish it, you can level your objections to it when we introduce it.

A. Let me explain this, concerning that May 3rd trial down in the Justice Court. I was unable to be present all through that hearing, because there was another hearing in the Court—in the Courthouse, at that time, which I thought was perhaps more important than that trial. That was the Freda G. Rednick appeal from the Secretary of State's refusal to grant her a renewal license to do business as a real estate agent. What was going on there in the 94th District Courtroom, with a man named J. S. McGarity, I believe, from the Secretary of State's office, as hearing commissioner. I spent most of my time there, and looked in just occasionally down in the Justice of the Peace Court. Consequently it wasn't a thorough coverage that I gave that trial downstairs in the Mayes case.

Q. But at the time the Mayes case was tried in the County Court——

A. I was aware of the trial, and I attempted to report it the best I could.

[fol. 240] Q. There was nothing, in your opinion, then going on in the courthouse of more importance?

A. At that time?

Q. Yes.

A. I told you just the opposite——

Q. I mean when it was on trial in the County Court?

A. Oh. I believe that was the only trial going on in the County Court at that time—or in the County Courthouse at that time.

Mr. D'Unger: Alright; that's all.

Cross-examination.

By Mr. Eckhardt:

Q. Mr. Mulvany, you didn't attend any of the meetings, or have any conferences with the persons responsible for passing the resolution referred to, did you?

A. No.

Q. Mr. Mulvany, when you wrote your articles, did you write them with the intent and calculation of influencing the administration of justice?

A. No.

Q. Mr. Mulvany, what is your experience as a Court reporter in general; whom have you worked for, what papers?

A. Well, several papers.

Q. Will you briefly tell us?

A. Yes, I have worked for, in Providence, the Tribune, the Star Tribune, the News Tribune, the Journal and Bulletin, and for the Record, in Boston, and the old Worcester Post, and a short time for the San Antonio Light.

The Court: Gentlemen, will you please speak a little louder? Both counsel and the witness, also.

A. I have worked for other organizations, such as The Engineering News Record. But the—generally, it is all news reporting work.

[fol. 241] Mr. Eckhardt: I think that's all.

Mr. D'Unger: No further questions—just a moment, there is one more question.

Redirect examination.

By Mr. D'Unger:

Q. Mr. Eckhardt asked whether or not you had attended these meetings of the various organizations. You state that you had not?

A. I had not.

Q. Then what you published in that connection was hearsay, as far as you were concerned?

A. Oh, no, it wasn't hearsay.

Q. Well, if you didn't attend the meetings, how did you get your information?

A. From written—or typewritten and signed resolutions that these organizations presented me.

Q. Do you have copies of those typewritten resolutions?

A. Yes, I have some of them here. Here are two.

Mr. Eckhardt: Let the stenographer identify them.

(Whereupon the same were marked by the reporter for identification as "St. Ex. No. 12", and "St. Ex. No. 13".

Q. Do you have the copies of the minutes for——

Mr. Eckhardt: I can't hear you?

Mr. D'Unger: I asked if he had copies of the—of any minutes at the meetings at which these resolutions were passed, or adopted.

Mr. Eckhardt: I think I have them, if you want it. I have them on one, anyway, not both.

Q. I will ask you if you are in position to testify that those are the signatures of the persons whose names are written there?

A. No, I am not.

[fol. 242] Mr. D'Unger: Just let that go, counsel. I won't need it.

Mr. Eckhardt: Well, I've got it somewhere here if you want it.

A. I have another one here that is in the form of my notes.

Q. Can I see that?

A. I don't believe you could make it out. I will tell you about it. This is a resolution enacted by the Central Labor Union, given to me by I. G. Irvin, Vice-President, who presided at the meeting on the night this action was taken. This is the resolution; it commended the Caller-Times Publishing Company, the Lookout, and its reporters, for their policy of fearlessly upholding the rights of its people to a free fress; that therefore, the Central Labor Union does

not believe the Caller-Times is in contempt, Judge Browning to the contrary notwithstanding.

Mr. D'Unger: The Court please, I would like to have the Court reporter reduce that—or transcribe that——

A. That is an enactment of the Central Labor Union, now; not my language.

Mr. D'Unger: I would like to introduce those resolutions there.

Mr. Eckhardt: Alright, go ahead.

Mr. D'Unger: The State now offers a resolution marked "State's Exhibit No. 12", adopted by the Mothers of Sons in Service, and "State's Exhibit No. 13", a resolution adopted by the Soldiers' and Sailors' Advisory Council of Corpus Christi, and signed by Frank C. Bonner, Chairman, and Rex L. Yickrey, Secretary.

The Court: I would like to read that one by the Mothers' Club; that never was presented to me.

Thereupon the instruments so identified were received in the evidence as State's Exhibits Nos. 12 and 13, and are in words and figures as follows:

[fol. 243] STATE'S EXHIBIT No. 12

Corpus Christi, Texas, May 30th, 1945.

Be it resolved by the Mothers of Sons in Service of Corpus Christi, Texas, after a full investigation, that this organization now condemns as a gross miscarriage of justice against a member of the Armed forces of the United States, the action of Joe D. Browning, County Judge of Nueces County, Texas, in instructing the jury in the case of Bush M. Jackson, et al., vs. Joe L. Mayes, et al., to return their verdict in said cause in favor of the plaintiffs, and in further compelling said jury, against their conscience, to sign such verdict; all of which was done by him, a layman, without any argument or citation of cases to show any legal or moral right of the plaintiffs to such a decision of the Court.

Mothers of Sons in Service, By —— ——, Secretary,
(Signed) Tre-s. Mrs. F. E. Peckenpaugh, Mrs. T. H. Sanders, Mrs. W. J. Smith, Pres. Army Mothers, Mrs. C. G. Harwood, V.-Pres. Army Mothers, Mrs. J. V. Shepard, Mrs. H. E. Allisen.

[fol. 244] STATE'S EXHIBIT No. 13

Be it resolved by the Soldiers' and Sailors' Advisory Council of Corpus Christi, Texas, that it is the opinion of this organization, upon a full investigation, that the action of Joe D. Browning, County Judge of Nueces County, Texas, in instructing the jury in the case of Bush M. Jackson, et al., vs. Joe L. Mayes, et al., to return a verdict in favor of the plaintiff, as was done by said judge on 27th inst., in the trial of said cause, was a gross miscarriage of justice against a member of the armed forces of the United States, and that said judge should be petitioned to grant the defendants in said action a new trial, and upon so granting said new trial in said cause, that said judge should disqualify himself to further sit as judge in said cause, and should permit the same to be retried before another judge and jury.

The above and foregoing Resolution was duly presented, seconded and adopted.

(Signed) Frank C. Bonner, Chairman.

Attest: (Signed) Rex L. Vickrey, Secretary.

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[fol. 245] Mr. D'Unger: That's all for the State, as far as Mr. Mulvany is concerned.

Recross-examination.

By Mr. Eckhardt:

Q. Did you receive the resolutions from the Mothers of Sons in Service from Mr. Pittman?

A. Yes.

Q. Is he the man who gave you the copy of it?

A. Yes.

Q. How did you receive the resolution from the—signed by Mr. Frank Bonner, and Mr. Rex L. Vickrey, marked "State's Exhibit No. 13"?

A. That was dictated to me over the telephone on the night of its enactment, and mailed to me on the same night and received the next day.

Q. On the 30th you received it?

A. That sounds right.

Mr. Eckhardt: That's all. Any further questions?
Mr. D'Unger: No further questions.

(Witness excused.)

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[fol. 246] SAMUEL I. PITTMAN, called as a witness by the State, being first duly sworn by the Clerk, and in answer to questions propounded, testified as follows, to-wit:

Direct examination.

By Mr. D'Unger:

Q. State your name, please?
A. Samuel I. Pittman.
Q. What is your occupation or business or profession?
A. I am an attorney in Corpus Christi.
Q. Mr. Pittman, in your professional capacity, do you represent an organization known as the "Mothers of Sons in Service"?
A. I do.
Q. I hand you herewith State's Exhibit No. 12, which purports to be a resolution adopted by that body, and ask you if you can identify it as such?
A. Yes, I drew this for my clients here, and gave it to them and they executed it as the officers of this club.
Q. Under what circumstances did you prepare that resolution?
A. Mrs. Allison called me. I represent Mrs. Allison and her husband in other particulars, and she said she was quite disturbed, as well as the other mothers, and that they would like to pass some sort of resolution, and asked me if I would draw it, which I did, and presented it to Mrs. Allison, Mrs. Peckenpaugh and Mrs Sheppard, and they, in turn, executed the instrument and brought it back.
Q. Mrs. Allison called you by telephone, did she not?
A. That's right.
Q. I will ask you if in the preparation of that resolution you had anything in the way that would serve as a guide?
A. No, nothing other than what I had seen in the newspapers.
Q. In other words, you got your idea for the substance of this resolution from what you had seen in the newspapers?
[fol. 247] A. That's right. In other words, I thought it,

was a very good resolution, so I followed that, and it suited my clients in that respect.

Q. Well, your opinion, then, was the opinion, or what you thought was the opinion of your clients, rather than your own, was that?

A. Yes, I put down there what they had in their minds, that's right. In other words, they agreed on the resolution, and I wrote it accordingly.

Q. Were you directed to follow the text of the other resolution?

A. Not necessarily. They left it, more or less, up to me, and then after it was submitted to them they kept it for, oh, a day or two before they brought it back to me.

Q. I hand you herewith State's Exhibit No. 13, which is a resolution purportedly adopted by the Soldiers' and Sailors' Advisory Council of Corpus Christi, and I will ask you whether or not that was the resolution *of* which you had read in the newspapers, and to which you had been referred by your clients?

A. Jerry, I don't remember which one it was. I believe there were two, one by the Veterans, or rather Veterans of Foreign Wars, or something, I have forgotten just exactly what it was, but one of the two of them, I did take the contents of that.

Q. Well, just read that and see if it refreshed your memory to a degree where you can answer the question.

A. In substance, I would say this is the same situation.

Q. That was the one from which you patterned your own resolution?

A. That's right.

Q. The resolution adopted by your clients contains this language: "After a full investigation, that this organization now condemns as a gross miscarriage of justice, after a full investigation."

A. Un huh.

Q. Did they report to you the nature of that investigation?

A. Merely that the most of them or all of them have sons [fol. 348] in the service, and that they had inquired around here and there, and had been reading in the newspapers, and had got a good deal of this thing—I think it was talked more fully than any murder case that has ever been tried in this County, and everybody was pretty well apprised of the facts from the newspapers and from hearsay, and I

wouldn't be at all surprised if these ladies didn't make some sort of investigation?

Q. They did tell you, however, that they had read the newspapers?

A. That's right.

Q. Did they tell you whether or not they had ever consulted the record in this case?

A. No, they didn't.

Q. At the time that resolution was drafted, the motion for a new trial in the case of Jackson, et al. vs. Mayes, et al was then pending, was it not?

A. Jerry, I don't remember. It has been some time ago.

Mr. D'Unger: I believe that is all. Just one more question.

Q. Did you read the newspaper reports of this trial?

A. Yes sir.

Q. I will ask you what effect those——

Mr. Eckhardt: If the Court please, I don't think that is material or relevant. The question is not how it affected public opinion of individuals; it is a question of the Court's interpretation.

Mr. D'Unger: If the Court please, we charge in the information that these articles were calculated to reflect upon the integrity of the Court, to embarrass the Court in the administration of justice, and to effect the force of justice.

Mr. Eckhardt: That is a legal question, not a question for the public to decide.

Mr. D'Unger: Mr. Pittman's answer would be probative whether or not it did reflect on the integrity of the Court.

[fol. 249] Mr. Eckhardt: That is a legal question, and invades the province of the Court to answer it. That's my objection. We should try this case to the Court; let him decide the legal questions.

Mr. D'Unger: I withdraw the question. That's all Mr. Pittman.

Cross-examination.

By Mr. Eckhardt:

Q. Mr. Pittman, did the representatives of the Mothers of Sons in Service request you to advise the Caller-Times Publishing Company of the passage of that resolution?

A. No, they did not, in so many words. They merely stated this: They said if they could have had this petition or resolution long enough that they could have had party after party's names on it, in protest against any injustice to a sailor or a soldier.

Mr. D'Unger: If the Court please, I am going to move that the witness' answer be stricken as not being responsive.

Mr. Eckhardt: That's right. I asked the question whether the representatives of the Mothers of Sons in Service, after they had drawn the resolution——

The Court: The objection is sustained. Strike the answer.

Mr. Eckhardt: I am re-framing that question.

A. That's all right.

Q. Did the representatives of the Mothers of Sons in Service, after this resolution was adopted, request you to advise anybody at the Caller-Times of its substance?

A. They did not say to do it or not to do it, no sir.

Q. Who did it? Did you do it?

A. I did it, yes. Mr. Mulvany asked me if I had it, that he understood that such a resolution was passed, and he understood I was the attorney for the ladies.

[fol. 250] Mr. Eckhardt: That is all.

Mr. D'Unger: No further questions.

The Court: Just a minute, Mr. Pittman. There is one question that I would like to ask.

A. All right.

Questions by the Court:

Q. Mr. Pittman, that is the original resolution that was written by you?

A. Yes sir.

Q. And how many copies were signed?

A. Judge, there were four or five, I presume.

Q. Four or five copies?

A. Yes sir.

Q. And you gave a copy to the Newspaper?

A. Yes sir.

Q. And you were supposed to send a copy to me?

A. No sir, I was not supposed to send a copy of it to you.

Q. You weren't supposed to send a copy to me?

A. No sir, I was not directed to send one to you.

The Court: All right.
Mr. Eckhardt: That is all.
Mr. D'Unger: Just a minute one further question.

Redirect examination.

By Mr. D'Unger:

Q. Your testimony is that you were directed to furnish the newspaper a copy?

A. No sir.

Q. But you did furnish the newspaper a copy?

A. I did, that's right.

Q. But you were directed not to furnish Judge Browning a copy?

A. I was not directed either way, to furnish it or not to furnish it. It was within my province, whether I could furnish it or not furnish it, that's right.

[fol. 251] Q. I will ask you, Mr. Pittman, whether or not, before the delivery of that copy of the resolution to the newspaper you discussed the matter of this resolution with anybody else, other than your clients?

A. No.

Mr. D'Unger: All right. Thank you.
Mr. Eckhardt: That is all.
The Court: Just one more question, Mr. Pittman. Were the four or five copies signed?

A. Judge, only one copy was returned to me.

The Court: That was the original?

A. That's right.

The Court: That is all.
Mr. Eckhardt: That is all.

(Witness excused.)

[fol. 252] REX L. VICKREY, called as a witness by the State, being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Direct examination.

By Mr. D'Unger:

Q. State your name, please.
A. Rex L. Vickrey.
Q. What is your occupation, Mr. Vickrey?
A. Veterans' Service Officer.
Q. I will ask you whether or not you have any connection with the Soldiers' and Sailors' Advisory Council of Corpus Christi, Texas?
A. I am Secretary and Treasurer of the Lodge.
Q. You are Secretary and Treasurer of the Lodge?
A. Yes sir.
Q. I hand you herewith State's Exhibit No. 13, which purports to be a resolution adopted by the Soldiers' and Sailors' Advisory Council of Corpus Christi, Texas, and which bears a signature purporting to be yours.
A. That's right.
Q. Is that your signature?
A. Yes sir.
Q. Were you present, Mr. Vickrey, when that resolution was adopted?
A. Yes sir.
Q. On what date was that resolution adopted?
A. I don't remember the date. I would have to look at the record.
Q. Could you furnish me with the date at a later time?
A. I don't know. I know I was there. It is in my office down at the Health Center building.
Q. You were there, and who else was there?
A. The whole group of men.
Q. Who do you mean by the whole group?
A. We have members from each Veterans' organization, and call them the Soldiers' and Sailors' Advisory Council.
[fol. 253] We have two members from each organization, from the two American Legions, the V. F. W., and D. A. V., from each one.
Q. How many members are there of the Council.

A. Two from the V. F. W., two from each of the two Legion posts, and two from the D. A. V. post. I think that's all. There are five posts, and each has two members.

Q. That would make ten members?

A. Yes sir.

Q. As a matter of fact, Mr. Vickrey, weren't there only seven men present at that meeting?

A. No sir. I can give you the name of every man that was at the meeting.

Q. Well, we will get to that later.

The Court: Just a minute, counsel. There are some other witnesses here. Do you want them put under the rule?

Mr. D'Unger: If the Court please, the State would like to invoke the rule and exclude them at this time.

The Court: Gentlemen, those witnesses that are in the court room arise and be sworn. Raise your right hand, gentlemen.

(Four witnesses standing and raising right hand and sworn.)

The Court: Gentlemen, you will remain without the hearing of the Court. Do not discuss the case with any one or let anyone discuss it with you. Remain out in the hall.

(The four witnesses retired from court room.)

Mr. Eckhardt: Do you invoke the rule, now?

Mr. D'Unger: Yes.

Q. Mr. Vickrey, this resolution recites "that it is the opinion of this organization, upon a full investigation, that the action of Joe D. Browning, County Judge of Nueces County, in instructing the jury in the case of Bush M. Jackson, et al., vs. Joe L. Mayes, et al., to return a verdict in favor of the plaintiff, as was done by said judge on the 27th [fol. 254] inst., in the trial of said cause, was a gross miscarriage of justice." Now, Mr. Vickrey, what was the nature of this full investigation that you conducted?

A. Well, I didn't conduct that. I am not president of the organization. I was just Secretary and Treasurer of the lodge.

Q. You didn't conduct it?

A. The investigation, no. I was Secretary and Treasurer.

Q. Was there any investigation made?

Q. Well, I couldn't say about that. The President is the man that can testify, and I don't remember who the investigating committee was.

Q. Mr. Vickrey, didn't you attest, as Secretary of that organization, that there had been an investigation made?

A. Well, it was brought out in the meeting there that there was an investigation made, yes sir.

Q. All right. Who brought it out?

A. I don't remember which one of them brought it up first, but the President, I think was the man that brought it up.

Q. What kind of investigation did he say had been made?

A. Well, I believe about the time that report come up I was called back in the office on the 'phone, and I don't remember just what was brought out in that.

Q. You, personally, didn't make any investigation?

A. No, sir, I didn't.

Q. And you weren't there when the report of the nature of the investigation was made to the body?

A. I don't believe I was in that office, but in the office right adjoining it, I was in there talking on the 'phone.

Q. But you did attest on this signed resolution that there had been a full investigation made?

A. Well, I attested that that resolution was presented there, yes sir. I was there when the vote was taken on the resolution.

Q. How did you vote on this resolution, Mr. Vickrey?

[fol. 255] A. I didn't vote.

Q. You didn't vote?

A. No, I was just writing, and I just went ahead putting the minutes down as they give it out.

Q. Who prepared the resolution as it stands now?

A. I believe it was Major Siler give the words to it, I won't be sure, but it seems like he was the man that worded it, and I just wrote it out as worded to me.

Q. Was there a vote had on the thing?

A. Yes, there was a vote taken on it.

Q. And how did it happen that you didn't vote?

A. Well, I was writing the minutes down, and I was just putting the stuff down. I was Secretary and had to take all the minutes.

Q. Aren't you entitled to a vote?

A. Yes sir.

Q. Why didn't you cease your labors long enough to vote on the issue?

A. Well, it was unanimous with all the rest of them, and I just went ahead and put it down. If I had voted, I would have voted that way.

Q. It was unanimous among the rest of them?

A. Yes sir.

Q. Did you know anything about this case, personally?

A. All I knew about it, I am a member of the Advisory Board of the Draftees, and I had a book on that, and I called the Judge up. That's all I knew about it.

Q. You called who?

A. The Judge, and told him I believed it come under the Soldiers' and Sailors' Relief Act of 1940.

Q. When did you call him up?

A. I don't know. Just a few days before the trial was had.

Q. And you told the Judge you thought that it came under the Soldiers' and Sailors' Civilian Relief Act of 1940?

[fol. 256] A. Yes sir.

Q. Are you a lawyer, Mr. Vickrey?

A. No, I am not, but I had the book there.

Q. Did you ever look at the record in this case?

A. No, I never looked at it.

Q. Well, then, what made you think it came under the Sailors' and Soldiers' Relief Act of 1940?

A. Well, taking the record of the man in service, and Mr. Burchers come down there once about the case.

Q. Mr. Burchers?

A. Mr. Burchers.

Q. Who is Mr. Burchers?

A. Right before the trial.

Q. You mean Mr. Burchard?

A. Burchard, yes sir.

Q. Mr. Burchard was one of the parties defendant in this case, wasn't he?

A. I don't know. I thought he was just working there for the man.

Q. Mr. Burchard, did you read the newspapers about this thing?

A. I didn't keep up with it very close, no.

Mr. Eckhardt: Not Mr. Burchard, Mr. Vickrey.

Q. How many times did Mr. Burchard come to you about this thing?

A. Just one time, I believe, was all. He come to get the book, and I read it and gave it to him.

Q. Did anybody else ever come to you about it?

A. No, nobody else. Several people called me on the 'phone.

Q. Who called you?

A. I don't remember any of them. They just said the Veterans ought to take a hand in it. I told them I didn't know anything about it.

Q. Did they give you their names?

A. I believe they did, but I don't remember who a one of them was.

Q. Now, is it your statement now that you knew any-
[fol. 257] thing about this matter at that time, or that you didn't know anything about it?

A. I didn't know but very little about the matter.

Q. Beg pardon.

A. I didn't study the case. I just knew he was in the service, and they come to me a lot of times about those cases, where the man is in the service.

Q. Mr. Viekrey, if you hadn't studied the case, how did you happen to put your name to this resolution, calling the verdict, the result of that trial a gross miscarriage of justice?

Mr. Eckhardt: Just a minute. The resolution doesn't say that. It attests that the resolution was passed. Anybody knows that.

A. I was just Secretary.

Mr. D'Unger: It is the opinion of these signers.

Mr. Eckhardt: I know, but the attestation is by the Secretary, which is the ordinary course of resolutions, that is, that the resolution was passed. You know that, Mr. D'Unger, as a lawyer.

Mr. D'Unger: This is a legal question.

Q. You say that you never talked to anybody but Mr. Burchard?

A. Not until this meeting, then it was brought up.

Q. Who presented this copy of the resolution to the newspaper?

A. That I couldn't say. I wrote it up just with a pen, and handed it to the President. He said, "I will have it typed." My secretary was gone when this meeting was held, and he said, "I will have it typed and give a copy to the newspaper," but I don't know who presented the copy.

Q. Did you take a vote on whether or not the newspaper should be furnished with a copy?

A. Yes, it was the concensus of opinion.

Q. So, it was decided, or it was the desire of the entire Council that the paper be furnished with a copy?

A. Yes sir.

[fol. 258] Q. And you have no knowledge of what investigation was made?

A. No.

Q. Who furnished the newspaper with the information that the meeting would be had for the purpose of adopting this resolution?

A. I presume it was the President. He would be the logical man.

Q. You don't know anything about it?

A. No, I don't know. They just called me and told me to wait, that they were going to meet there at the office. I am usually held there until 6:00 or 7:00 o'clock, anyhow.

Q. Mr. Vickrey, you stated that you had called the Judge on the telephone?

A. Yes sir.

Q. Before the trial?

A. Yes sir.

Q. You did that at the instance of Mr. Burchard?

A. Well, in a way, yes. He asked me what I thought about it, and I told him, I said, "I will call the Judge, we have got this right here in this book, and I believe it applies to any service man.

Q. Did you ever talk to Mr. LeGrande Woods about this thing?

A. No, I never spoke one word about it.

Q. Did you ever talk to Mr. Tom Mulvany about it?

A. No sir.

Q. And you don't know who informed the newspaper that there was going to be a meeting for the purpose of adopting that resolution?

A. Well, I don't think that any body notified the paper that there was going to be a meeting held for that. I think they just said there would be a meeting of the Soldiers' and

Sailors' Advisory Council, because they didn't decide to adopt that until the meeting.

Q. What was that again?

A. You said to hold a meeting to adopt the resolution. We didn't know what the resolution was going to be until we got in the meeting.

[fol. 259] Q. And so, if the paper ran the story with the purported contents of the resolution before the resolution was passed, then the paper was mistaken about it, is that right?

A. I don't think they run it.

Q. Beg pardon?

A. I don't think they run it before it was passed.

Q. Now, at the time that this resolution was adopted, you had the matter pretty well in mind, didn't you?

A. Which matter is that?

Q. This Mayes matter, this Mayes case?

A. Well, I hadn't studied much about it; I had been too busy to study about it. They just phoned us they were going to have a meeting, and I had to meet with them as Secretary and Treasurer of the lodge.

Q. Had you given the matter any thought?

Mr. Eckhardt: If the Court please, that is just asking the question over and over again, just killing time.

Q. Did you have any opinion about it at that time?

A. I hadn't studied it out.

Q. Beg pardon?

A. No, I had nothing except what I told you about calling the Judge. I didn't tell him it was emphatically, because I wasn't sure, but I told him I believed it was.

Q. Did you read the newspaper story about that trial?

A. Not all of them.

Q. You read some of them?

A. Yes sir.

Mr. D'Unger: That is all.

Cross-examination.

By Mr. Eckhardt:

Q. Mr. Vickrey, you won't undertake to say that some other members of the Advisory Counsel didn't advise the paper that there might be a meeting, there was a meeting?

[fol. 260] A. No, I didn't say that, no, but I didn't.

Q. You don't know what they said to the paper?
A. No, I don't.

Mr. Eckhardt: That is all.
Mr. D'Unger: That is all, Mr. Vickrey.

By Mr. Eckhardt:

Q. Could you find out what date that was from the lodge and just give us the date of the resolution, to save time?
A. It is on the resolution, but I don't remember just what date.

Mr. D'Unger: I am afraid it isn't on the resolution.
Mr. Eckhardt: It isn't on that resolution, but it is on the minutes.

A. It is in the minutes, yes. I can give it to you out of the minutes.

By Mr. D'Unger:

Q. Let me ask you one more question, in that connection, Mr. Vickrey. Did you, as Secretary of the organization, furnish the Caller-Times with a certified copy of those minutes?
A. No sir.

Mr. D'Unger: All right. That is all.

(Witness excused.)

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[fol. 261] FRANK C. BONNER, called as a witness by the State, having been duly sworn by the Court, in answer to questions propounded, testified as follows, to-wit:

Direct examination.

By Mr. D'Unger:

Q. State your name, please.
A. Frank C. Bonner.
Q. Where do you live, Mr. Bonner?
A. 1002 Second Street.
Q. That's here in Corpus Christi, and Nueces County?
A. Yes sir.
Q. Mr. Bonner, I will ask you whether or not you are a member of or hold any office in the Soldiers' and Sailors' Advisory Council in Corpus Christi, Texas?

A. Yes sir.

Q. What is that office?

A. I am Chairman of it.

Q. You are Chairman of the Committee, or Council, rather?

A. Yes.

Q. I hand you herewith State's Exhibit No. 13, which purports to be a resolution adopted by the Council and signed by yourself as Chairman?

A. Yes sir.

Q. Do you remember on what date that was adopted?

A. No, I don't.

Q. Mr. Bonner, this resolution states that in the opinion of the organization, upon the full investigation, the action of the County Judge, Joe D. Browning, in the Mayes case, to shorten it, was a gross miscarriage of justice. What was the nature of the "full investigation" that you referred to here?

A. Well, it was just what we heard by different ones that talked to us, also what was in the papers.

[fol. 362] Q. What was in the papers?

A. Yes sir.

Q. And who did you talk to?

A. Oh, I don't remember all that I talked to, because there were so many, I had so many telephone calls, meet people on the street, and they were all talking to me about it.

Q. Do you recall anybody that talked to you?

A. Not off hand, no sir.

Q. Do you recall anybody that called you on the telephone?

A. Yes, Aubrey Daly spoke to me about it, said he had been gettin- lots of calls.

Q. Well, he is a fellow member of the Council?

A. Yes sir.

Q. And did he tell you who had called him?

A. No sir.

Q. Well, was any member of the Council appointed for the purpose of making an investigation?

A. No, we all made it.

Q. All right, that's what I am trying to get at. What was the nature of your investigation?

A. Well, just as I say, what we heard, and what was told us and what we saw in the papers.

Q. And what you saw in the newspapers?

Mr. Eckhardt: That isn't what he said,—what he saw and heard, and what was told him.

A. And the feeling about the town.

Q. Do you know what that feeling was based on?

A. I suppose the same as we had.

Q. You don't know?

A. From the way they talked, it must have been.

Q. Did you ever consult the record in that case?

A. No sir, we took it from what we had heard and seen in the papers.

Q. I will ask you, Mr. Bonner, whether the fact was de- [fol. 263] veloped at the meting at which this resolution was adopted that the check which Private Joe L. Mayes, or his agent, Mr. Burchard, had tendered for the exercise of his option on the premises involved was a post-dated check?

Mr. Eckhardt: If the Court please, I don't think this is relevant and material. I don't mind his going into it. It is just lengthening the record, and has no bearing at all on the issue of contempt.

Mr. D'Unger: If your Honor please, these gentlemen have seen fit to term a ruling of this Court a gross miscarriage of justice, and they have stated that they did it after full investigation, and I want to know just what facts they had before them.

Mr. Eckhardt: We waive the objection, in the interest of time.

Q. Did you know that the check for $275.00 that was so frequently referred to was a post-dated check?

A. Only what the paper said.

Q. Only what the paper said? Did you ever talk to Mr. Burchard about this?

A. Not in regards to what was taking place. We talked about the meeting, and he just thanked us for coming out and getting them. That was all. There was nothing said about what took place.

Q. Did you know who the parties plaintiff in that action were? Strike that. Let me put it differently. Did you

know that Frederick Flato, Franklin Flato, Robert Flato and Dr. Harry G. Heaney were parties plaintiff in this thing?

A. No sir.

Q. Did you know that Robert Flato was now a Lieutenant in the Army?

A. No sir.

Q. And you say there was no one appointed to make an investigation?

A. No sir.

Q. That this resolution was adopted on what you had [fol. 264] heard and what you had seen in the papers?

A. Yes sir.

Q. Did Mr. Vickrey state at that meeting that Mr. Burchard had been to him before the meeting?

A. No sir, I don't remember anything of that nature.

Q. Mr. Bonner, who directed that a copy of this resolution be furnished to the newspaper?

A. Well, that was understood, that he was to get one, the paper was to get one, and it was taken up.

Q. What do you mean it was understood?

A. Well, when it was read and we passed on it, it was to be handed to the publisher.

Q. Understood by and between whom?

A. The Council.

Q. The Council?

A. The Council.

Q. Was there a vote taken on that?

A. Yes sir.

Q. Did you vote on the adoption of this resolution, Mr. Bonner?

A. I don't remember as to that. Being Chairman of it, I don't think the Chairman votes, does he?

Q. Ordinarily he doesn't. Do you recall what the vote was?

A. It was unanimous.

Q. How many members were present?

A. Ten.

Q. Ten members present and how many votes were cast for the adoption of the resolution?

A. There would be nine then.

Q. Be nine, and the Secretary voted?

A. Well, I don't know; I don't remember on that, but there was nobody against it.

Q. Now, Mr. Bonner, there was a story published in the Corpus Christi Caller the day before this resolution was [fol. 265] adopted, stating that a meeting would be held in a downtown office building for the purpose of passing this resolution——

Mr. Eckhardt: It didn't say "this resolution." A resolution.

Q. A resolution condemning Judge Browning——

Mr. Eckhardt: It didn't say that, either.

Q. This story was published in the Caller on the 29th day of May, and it reads: "Representatives of seven ex-servicemen's organizations in Nueces County are scheduled to meet tonight to act on a resolution requesting that County Judge Joe D. Browning grant a new trial in the Playboy Cafe eviction suit. Directors of the Veterans Council, representing 1,231 members of the ex-servicemen's groups, announced last night the resolution also will petition that Judge Browning 'let the issues rest with the jury.' Directors of the Veterans Council said last night their organization represents three American Legion Posts in Nueces County, including two in Corpus Christi, two Veterans of Foreign War posts; one Disabled American Veteran post and one Spanish American War Veterans post. Announcement of the meeting of ex-servicemen's groups coincided with statements last night from attorneys for Private Joe L. Mayes that they will file a motion today in Browning's court asking a new trial, Judge Browning, sole judge of his rulings on the eviction suit, will hear arguments on the motion and determine whether the new trial is to be granted."

Mr. Eckhardt: Where are you reading from?

Mr. D'Unger: On the 29th.

Mr. Eckhardt: The Caller?

Mr. D'Unger: The Caller.

Q. Now who were the directors of the Council Mr. Bonner?

A. Well, the Chairman and the Secretary are the only two officers.

Q. Well, would they be the directors?

A. Well, I don't know about that.

[fol. 266] Q. Well, who gave this information to the newspaper?

A. I don't know anything about that.

Q. Did you deliver it?

A. No sir.

Q. Would any other member of the body be authorized to release information of this sort?

A. No, not of that meeting.

Q. I wonder how the Council happened to know that there would be a motion for a new trial filed, since it hadn't been filed?

A. I don't know as to that. Of course, I knew nothing about it, never even thought of the meeting when that was put in the paper.

Q. Who suggested the meeting? Who called it?

A. Well, I talked to Aubrey Daly and Les Wolford, and that was the day we met, when the pressure got so strong that I felt we had to do something.

Q. What pressure?

A. By the people that called us and wanted to know what we were going to do about it.

Q. Who were these people?

A. I don't know, a lot of them I didn't even ask their names.

Q. But on the strength of anonymous telephone calls, you went ahead and adopted the resolution, is that right?

A. Not necessarily. We knew that we had to do something as an organization. They tried to get me to give a statement, and I wouldn't do that, because I am just one of all the Veterans.

Q. But you didn't give the newspaper this information?

A. I never gave the newspaper a thing until after our Council had closed that meeting on this resolution.

Q. And you don't know how the Council happened to know that a motion for new trial was to be filed?

A. No, I don't know anything about that.

Mr. D'Unger: That is all, Mr. Bonner.

[fol. 267] Cross-examination.

By Mr. Eckhardt:

Q. Mr. Bonner, I hand you what purports to be the Minutes of the Soldiers' and Sailors' Advisory Council of Corpus Christi, Texas, special meeting called and held May 29th at the Health Center Building, Shoreline Boulevard,

at 7:00 P. M., and attached purports to be the resolution, original of the resolution, which is State's Exhibit No. 13. Will you look at these documents and see if they are the Minutes and attached resolution?

A. Yes.

Q. Is that correct?

A. Yes.

Q. When do the Minutes show the meeting was held?

A. May 29th, 1945.

Q. Now, on the resolution attached to the Minutes is some handwriting. Is that your handwriting?

A. It is.

Q. Is that your initialing?

A. It is.

Q. Did you after the resolution was passed did they furnish a copy to the Caller-Times?

A. They did.

Mr. Eckhardt: That is all.

Redirect examination.

By Mr. D'Unger:

Q. Who furnished that copy, Mr. Bonner?

A. I did.

Mr. Eckhardt: We will offer the Minutes and original of the resolution in evidence. Any objection?

Mr. D'Unger: Absolutely none.

The same being by the Court Reporter marked, (Respondents' Exhibit No. 14—BEA.) Said Exhibit is, in words and figures, as follows:

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[fol. 268] RESPONDENTS' EXHIBIT No. 14

Ernest H. Gragg Post: Frank C. Bonner, 1001 2nd St., 6635; Les Wolford, 1454 15th St., 2-2077

B. & P. Post: Aubrey Daly, 604 Mesquite, 2-4941.

D. A. V., James Haynes, 2505 Niagara, 7358; Rex L. Vickrey, Health Unit, 2-8313.

John Timon V. F. W.; Frank Daugherty, 1536 17th, 9098; LeRoy Moses, 149 Richards, 2-7056.

Corpus Christi V. F. W.: Harry Wilson, Rt. 4, Box 740; Ray Starner, 2125 Stillman, 2-1536.

Soldiers and Sailors Advisory Council,
Corpus Christi, Texas

Special meeting called, and met at the Service Officer's Office in Health Building on Shoreline Blvd., May 29th 1945 at 7:00 P. M.

Frank C. Bonner, Chairman, presiding with the following members of the Council present: Les Wolford, James Haynes, Major Siler, and LeRoy Moses.

Motion made by Les Wolford, that due to the fact that certain members of the Council are not available and their addresses are unknown; that these members be replaced by the present Commanders and another member of his choice, to be elected as qualified members. I make this motion as there has been no meeting since 1941 of the Council and the vacancies filled. Motion was seconded by Major Siler. The motion carried and Harry Wilson and Ray Starner of the Corpus Christi V. F. W. Post, Frank Daugherty of John Timon V. F. W. Post, Aubrey Daly of the B. & P. Post were elected to fill the vacancies.

Motion was made by Major Siler that due to the extreme emergency, demanding immediate action by the Council, that the members present proceed with any necessary business and that the actions of this date, of this Council be presented to the respective veterans' organizations for approval and confirmation. Motion seconded by James Haynes. Motion carried.

[fol. 269] A Resolution was read by the Secretary, requesting Joe D. Browning, County Judge of Nueces County, Texas, to permit a new trial in the case of Bush M. Jackson, et al., vs. Joe L. Mayes, et al., also to disqualify himself to further sit as judge in this trial and to permit the same to be retried before another judge and jury. Motion was made by Ray Starner that the Resolution be accepted and a copy presented to Joe D. Browning and one given to the Caller-Times for publication. Motion was seconded by James Haynes. Motion was placed before the Council and carried.

Motion was made by Les Wolford that a copy of the Resolution be made and mailed to Commander of each Veterans' Organization represented in this Council. Motion seconded by Aubrey Daly. Motion carried.

The original copy of the Resolution mentioned in above motion is attached to these minutes.

There being no further business to be brought before the Council at this time the Chairman called for adjournment,

Frank C. Bonner, Chairman.

Rex L. Vickrey, Secretary.

Be It Resolved by the Soldiers' and Sailors' Advisory Council of Corpus Christi, Texas, that it is the opinion of this organization, upon a full investigation, that the action of Joe D. Browning, County Judge of Nueces County, Texas, in instructing the jury in the case of Bush M. Jackson et al., vs. Joe Mayes, et al., to return a verdict in favor of the plaintiffs, as was done by said judge on 27th inst., in the trial of said cause, was a gross miscarriage of justice against a member of the armed forces of the United States, and that said judge should be petitioned to grant the defendants in said action a new trial, and upon so granting said new trial in said cause, that said judge should disqualify [fol. 270] himself to further sit as judge in said cause, and should permit the same to be retried before another judge and jury.

The above and foregoing Resolution was duly presented, seconded and adopted.

Frank C. Bonner, Chairman.

Attest: Rex L. Vickrey, Secretary.

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[fol. 271] Aubrey Daly, called as a witness by the State, first having been duly sworn, testified as follows:

Direct examination.

By Mr. D'Unger:

Q. Were you sworn, Mr. Daly?
A. Yes sir.
Q. State your name, please.
A. Aubrey Daly.
Q. Where do you live, Mr. Daly?
A. 1301 Florida Avenue, Corpus Christi.
Q. Nueces County?
A. Yes sir.
Q. Mr. Daly, I will ask you whether or not you are a member of an officer of the Soldiers' and Sailors' Advisory Council of Corpus Christi?

A. As Commander of the American Legion I automatically became a member of it.

Q. I hand you State Exhibit No. 13, which purports to be a resolution adopted by the Council as it is developed on the evening of May 29th. Was such a resolution adopted at that time?

A. It was.

Q. And that is the resolution?

A. Yes.

Q. Mr. Daly, this resolution contains the following statements, "That it is the opinion of this organization upon a full investigation, that the action of Joe D. Browning, County Judge of Nueces County, Texas, in instructing the jury in this case of Bush M. Jackson, et al., vs. Joe L. Mayes, et al., to return a verdict in favor of the plaintiffs, was done by said judge on the 27th inst., in the trial of said cause, was a gross miscarriage of justice — a member of the armed forces of the United States, * * *." Mr. Daly, what was the nature of that investigation?

[fol. 272] A. Well, it was discussed by the members of the Council.

Q. It was discussed by the members of the Council?

A. Yes sir.

Q. What effort did you make to determine the facts?

A. I don't think there was any effort to be made. It seemed everybody knew the facts in the case.

Q. Did your investigation consist of gathering it?

A. We didn't gather it up. It was called in to us.

Q. Who called it in to you?

A. I had about forty calls on the morning of May 29th from families of boys in the service.

Q. Who were some that you talked to?

A. Well, I couldn't remember that.

Q. Did you discuss this matter with any one?

A. I preferred not to discuss it with any one until the Council met.

Q. Who called the Council meeting?

A. The chairman, Frank Bonner.

Q. Did you vote on this?

A. Yes.

Q. What was that vote?

A. Do I have to answer that?

Mr. D'Unger: Yes, I believe you do.

A. Well, I——

Mr. D'Unger: However, let the Judge rule on it.
Mr. Eckhardt: I don't have any objection.

A. The vote was unanimous so I must have voted on it.
Q. How many members were present?
A. Ten.
Q. How many voted for the resolution?
A. I think every one voted except the Secretary.
Q. That would be nine, wouldn't it?
A. Yes.
Q. Was there any one appointed to make an investigation?
[fol. 273] A. No.
Q. In other words, your investigation consisted of the discussion had by the members of the Council at that meeting?
A. That and hearsay and what I had read in the newspapers.
Q. How much had you read in the newspapers?
A. I think most of it. I think I had read most of it or all of it.
Q. Did you ever read in the newspapers that this notorious check for $275.00 was a post-dated check?
A. No, I don't believe so.
Q. Did you ever read in the newspapers that one of the plaintiffs was a Lieutenant in the Army?
A. No, I didn't read that. I think the only plaintiff mentioned was Bush Jackson.
Q. Only plaintiff mentioned was Bush Jackson?
A. Yes.
Q. Did you talk to any one before this meeting about this matter?
A. You mean previous to it?
Q. Did you talk to any one previous to that meeting?
A. Yes, I talked with——
Q. Who did you talk to?
A. To the Post Commanders of the other posts and Veterans of Foreign Wars.
Q. Did you talk to any one else?
A. Yes, I had to talk; in about forty telephone calls you have to say something.
Q. Even to anonymous people?
A. Why certainly.

Q. Did you ever talk to anybody connected with this case?

A. No, I don't think anybody directly.

Q. Mr. Daly, I will direct your attention to the photostatic copy of the Corpus Christi Caller for May 29th, which carries a story I will read it to you.

A. All right.

[fol. 274] Q. "Respresentatives of seven ex-service men's organizations in Nueces County are scheduled to meet tonight to act on a resolution requesting that County Judge Joe D. Browning grant a new trial in the Playboy eviction case. Directors of the Veterans Council, representing," and describing the organization, "announced last night the resolution will also petition that Judge Browning 'let the issues rest with the jury.' Directors of the Veterans Council said last night their organization represents three American Legion Posts in Nueces County, including two in Corpus Christi, two Veterans of Foreign Wars posts; one Disabled American Veterans post and one Spanish American War Veterans post. Announcement of the meeting of the groups was coincident with the statement of Mayes attorneys that they will file a motion for a new trial. Judge Browning being the sole judge of the matter is to determine whether or not a new trial is to be granted." Now, Mr. Daly——

A. Yes.

Q. Did you furnish the newspaper with any part of the information published here in connection with this scheduled meeting?

A. I believe I did.

Q. You believe you did?

A. Yes sir.

Q. Can you be a little more definite?

A. Yes. I was telephoned by a reporter I believe of the newspaper and asked if any action was going to be taken.

Q. Did he call you or you call him?

A. He called me.

Q. Do you know who the reporter was?

A. No, I dodn't.

Q. Did he give any name?

A. No sir.

Q. Did he tell you who he represented?

A. He said it was the Caller-Times calling.

[fol. 275] Q. The Caller-Times?

A. Yes.

Q. Did you tell him you were going to meet and adopt a resolution requesting County Judge Joe D. Browning to grant a new trial in the case?

A. No, I didn't tell him that. I told him we were going to have a meeting.

Q. Did you tell him you were going to adopt a resolution?

A. No.

Q. You didn't?

A. No.

Q. You didn't announce to him last night, which would have been the night of the 28th, that the resolution will also petition that Judge Browning let the issues rest with the jury?

A. No.

Q. You didn't tell him that?

A. No.

Q. Did you know on the night of May 28th that council for the defendants, Mayes and Burchard, were going to file a motion for a new trial on Tuesday, the 29th?

A. No.

Q. Did you know it at the time you adopted this resolution?

A. I believe it was in the newspapers.

Q. It was in the newspapers so you couldn't have told whoever it was that called you from the Caller-Times that you were going to adopt a resolution asking the Judge to grant a new trial?

A. No.

Q. Because you didn't know that?

A. No, certainly not.

Q. I will ask you whether or not you ever talked with F. F. Burchard about this matter?

A. Never.

Q. Did you ever talk with LeGrande Woods about it?

[fol. 276] A. No, I never did. I haven't seen LeGrande Woods in a long time.

Q. Did you ever talk to Mr. Mulvany, Tom Mulvany about it?

A. Yes.

Q. When was that?

A. I think it was the day after our meeting.

Q. That was while the motion for new trial was still pending?

A. Yes.

Q. Before it had been ruled on?
A. Yes.
Q. Did you give Mr. Mulvany the text of that resolution?
A. No. It was 'phoned by either the secretary or Lester Wollford the evening after the meeting.
Q. Now, in this particular story that we have just discussed here it states that this information, a portion of it, that the announcement came from the directors of the Council. Are you a director of the Council?
A. Just a member.
Q. Just a member?
A. Yes sir.

Mr. D'Unger: All right. That will be all.

Cross-examination.

By Mr. Eckhardt:

Q. Mr. Daly, you testified that you read the newspapers, all of them or practically all of them?
A. Yes sir.
Q. During the pendency of this suit and while it was being tried did you read the Corpus Christi Times of May 28, an article concerning Mayes' attorneys preparing to file motion for new trial?
A. I can't remember whether I did.

Mr. D'Unger: If the Court please, he just testified he knew nothing about it.
Mr. Eckhardt: Just a minute. You called him as your [fol. 277] witness, and I have a right to ask him about these publications in evidence.
Mr. D'Unger: We just make the objection.

Q. You testified you read most of these papers?
A. Yes sir, practically all of them.
Q. Read them all?
A. Yes.
Q. If you read the papers you must have been advised the morning of the 28th that *that* Mayes was filing a motion for a new trial?
A. If I read every news article on it I certainly did.
Q. Your testimony was you thought you read them all, is that right?
A. That is right.

Q. Now, when you advised the reporter, whoever he was, for the newspaper, you did tell him this meeting was called for, among other things, to take some action in regard to the Mayes case, isn't that right?

A. That is true.

Q. And at that time if you had read the papers you would have known that a motion for a new trial was pending?

A. Yes sir.

Q. Isn't it a fact the real purpose of the meeting was to see what could be done about the Mayes case?

A. Yes.

Q. Looking at it from a layman's standpoint or veteran's standpoint?

A. It was more from a veteran's standpoint.

Mr. Eckhardt: That is all.

Redirect examination.

By Mr. D'Unger:

Q. Mr. Daly, what was your chief source of factual information in connection with the Mayes case?

A. Well, it would be hearsay and what I read in the newspapers. That is about the only source of any information.

Q. Did you hear more or read more?

[fol. 278] A. I think I heard more than I read.

Q. Did what you heard coincide pretty accurately or closely with what you read?

A. Yes.

Q. In other words, what you heard could have come from the same source as what you read?

A. Very much.

Q. I will ask you this one more question: How long had it been prior to the 28th day of May, 1945, since the Council had met?

A. Oh, I think it was nearly four years.

Q. Nearly four years?

A. Yes.

Q. And they became so aroused over this matter that they decided to meet?

A. I wouldn't say that. I was called as Commander of my post to make a statement, which I refused to do, because my post hadn't met, and I talked to the Commanders of the other posts and the meeting of the Council was called.

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Q. Had you known one of the other parties in this suit was in the armed services you would have lent your efforts in his behalf?

A. Why, certainly.

Mr. D'Unger: That is all.

Mr. Eckhardt: That is all.

The Court: Mr. Daly, any of the people, you stated you formed your opinion from hearsay. Was there any of these people that you talked to, did any of them tell you they had been in the court room and had heard the evidence?

A. I don't think so, Judge.

The Court: Any further questions?

Mr. D'Unger: No.

Mr. Eckhardt: No.

The Court: Stand aside. Counsel will agree to excuse Mr. Daly?

[fol. 279] Mr. D'Unger: Yes.

The Court: You will be excused.

Mr. Daly: Thank you.

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[fol. 280] LESTER WOLLFORD, Called as a witness by the State, first having been duly sworn, testifid as follows:

Direct examination.

By Mr. D'Unger:

Q. You have been sworn, have you not?

A. Yes sir.

Q. State your name, please.

A. Lester Wollford.

Q. Where do you live, Mr. Wollford?

A. 1454 Fifteenth Street.

Q. In Corpus Christi?

A. In Corpus Christi, yes sir

Q. Neuces County? I will ask you whether or not, Mr. Wollford, you are a member or officer of the Soldier's and Sailor's Advisory Council of Corpus Christi, Texas?

A. Member.

Q. Member?

A. Yes sir.

Q. I hand you State Exhibit No. 13, purporting to be a resolution adopted by that body, and ask you whether or not you were present at the time that resolution was adopted?

A. I was.

Q. Is that the resolution that was adopted?

A. Yes sir.

Q. Mr. Wollford, this resolution contains the following language: "That it is the opinion of this organization, upon a full investigation, that the action of Joe D. Browning, County Judge of Nueces county, Texas, in instructing the jury in the case of Bush M. Jackson, et al., vs. Joe L. Mayes, et al., to return a verdict in favor of the plaintiffs, as was done by said Judge on 27th inst., in the trial of said cause, was a gross miscarriage of justice * * * *." Let me ask you, Mr. Wollford, what was the nature of this [fol. 281] full investigation?

A. I don't know who did that.

Q. Did you personally make any investigation?

A. No sir.

Q. You voted for the adoption of this resolution, did you not?

A. Yes sir.

Q. Were there any findings by any investigator or investigators reported at that meeting prior to the adoption of the thing?

A. I know of nothing but that document.

Q. In other words you just got together and said we will adopt this?

A. We was taking it for this service member.

Q. And didn't conduct any investigation?

A. I didn't, no sir.

Q. Do you know if the body conducted any?

A. I don't know.

Q. And did you have any knowledge of the facts?

A. Just what I read in the papers and what I heard on the street.

Q. Just what you read in the paper?

A. And heard on the street.

Q. You never did consult the record in this case?

A. No sir, I'm not a lawyer.

Q. You are fortunate?

A. Maybe so.

Q. Just what did you know of the facts in this Mayes case when you voted for the adoption of this resolution?

A. What I had read at the time and previous to that in the paper and heard on the streets.

Q. Do you know who all of the parties were in the thing?

A. No sir, I don't know all of the parties.

Q. Did you know anything about the legal merits of the thing?

A. No sir; I am still no lawyer.

Q. Did you know who was right and who was wrong?

A. Well, that is my own opinion regardless of whether it is right or wrong.

[fol. 282] Q. All right, upon what did you base your opinion?

A. From what I had read and what I heard on the streets.

Q. Who had you talked to about this thing?

A. Well, I refused to answer the telephone for one thing because I was getting telephone calls from various members of our organization.

Q. Do you recall their names?

A. No sir, I don't recall their names.

Q. Did you talk to any one directly?

A. You mean in person?

Q. In person, yes, tedete, we say?

A. Well, yes.

Q. Who did you talk to?

A. Do I have to answer that?

Mr. D'Unger: As the Judge.

The Court: Yes sir. You will have to answer it.

A. All right.

The Court: If it is regarding this case.

A. Ed Furman.

Mr. Eckhardt: What is the materiality in a contempt proceedings of who he talked to or how they got their information. We are not trying these gentlemen. This is a contempt proceeding. It has gone far afield, and I want to make the objection so it will be in the record, that this thing has gotten completely out of hand.

Mr. D'Unger: If the Court please, the purpose of this questioning is to show that this resolution is a part of what Mr. McCracken has described as the wrath of public opinion

and was largely the result of the newspapers handling of the reports of the proceedings.

Mr. Eckhardt: That is a question of law. It may be largely as to the facts of the case as shown by Exhibit A.

Mr. D'Unger: If the Court please, it is an issue of fact. [fol. 283] Mr. Eckhardt: I would like to have a ruling so it will be in the record.

The Court: Objection overruled.

Mr. Eckhard: Note our exception.

The Court: Major Siler, you may return at 2:00 o'clock this afternoon.

Mr. D'Unger: Just a minute. I think maybe we can get to him this morning.

The Court: Wait a minute, Major Siler. They think they can soon use you. You will be sworn and remain outside.

Mr. Eckhardt: Does this record show when the rule was invoked?

Mr. D'Unger: I believe it does. It was invoked just before Mr. Vickery was put on the stand.

Mr. Eckhardt: May that be noted in the record.

(Major Siler was sworn as a witness and instructed as to the rule and retired from the court room.)

Q. Mr. Wollford, I hand you here a photostatic copy of the Corpus Christi Caller-Times for May 29th and ask you to——

Mr. Eckhardt: Caller-Times of May 29th?

Mr. D'Unger: The Caller. Pardon me, Corpus Christi Caller of May 29th.

Q. And I will read it: "Representatives of seven ex-servicemen's organizations of Nueces County are scheduled to meet tonight to act on a resolution requesting that County Judge Joe D. Browning grant a new trial in the Playboy Cafe eviction case. Directors of the Veterans Council, representing 1231 members of the ex-servicemen's groups, announced last night the resolution also will petition that Judge Browning 'let the issues rest with the jury.' Directors of the Veterans Council said last night their organization represents," and describing the groups. "Announcement of the meeting of ex-servicemen's groups coincided with statements last night from attorneys for Pvt.

[fol. 284] Joe L. Mayes that they will file a motion today in Browning's court asking a new trial. Judge Browning, sole judge of his rulings on the eviction suit, will hear arguments on the motion and determine whether the new trial is to be granted." Did you give that information to the newspaper, Mr. Wollford?

A. No sir.

Q. Did you ever discuss this thing with any of the newspaper reporters?

A. I don't recall that I did.

Q. You didn't discuss it with Tom Mulvany?

A. No sir.

Q. And you had nothing to do with——

A. No sir.

Q. I mean this statement?

A. No. In fact I don't know where that statement came from.

Q. Let me ask you this, Mr. Wollford: Was there any discussion had at that meeting that night about this statement?

A. Yes, there was. We was wanting to know where that statement came from. We never did find out. Never have found out yet.

Mr. D'Unger: That is all.

Cross-examination.

By Mr. Eckhardt:

Q. You did know that Mr. Aubrey Daly had advised some reporter who called him that there would be a meeting on the night of the 29th?

A. No sir, I didn't know that.

Q. You won't undertake to say that is not a fact?

A. I don't know if he ever talked to a reporter.

Q. You don't know whether he did or didn't?

A. No, I don't know whether he talked to them or didn't talk to them.

Q. If Mr. Aubrey Daly testified he did talk to them would you say he is wrong?

A. No. I would say he is right, because I would take his word for it.

[fol. 285] Mr. Eckhardt: That is all.

Redirect examination.

By Mr. D'Unger:

Q. Mr. Aubrey Daly was present at that meeting that night?

A. Yes sir, that is right.

Q. The fact he had discussed the matter with a reporter wasn't disclosed?

A. No, he didn't tell us then who he had talked to.

Q. So then you didn't know who gave that information?

A. I didn't know and I didn't want any paper to get it.

Q. Mr. Wollford, did you ever talk with Mr. F. F. Burchard about this thing?

A. No sir. I don't know that man.

Q. Ever talked with Mr. LeGrande Woods about it?

A. No sir.

Mr. D'Unger: That is all.

Mr. Eckhardt: That is all.

The Court: Are you gentlemen through with Mr. Wollford?

Mr. D'Unger: Yes.

The Court: Mr. Wollford, you may be excused.

Mr. Wollford: Thank you.

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[fol. 286] Major Arnold M. Siler, called as a witness by the State, first having been duly sworn, testified as follows:

Direct examination.

By Mr. D'Unger:

Q. State your name, please.

A. Arnold M. Siler.

Q. Where do you live?

A. 465 Southern, Corpus Christi.

Q. I will ask you whether or not you are a member or officer of that organization known as the Soldier's and Sailors' Advisory Council of Corpus Christi, Texas.

A. I am a member, not an officer.

Q. I hand you herewith State Exhibit No. 13, which is a copy of the resolution adopted by that body on the night

of May 28th, I believe it is, and ask you if you were present when that resolution or a similar one was adopted?

A. I was.

Q. Is that——

Mr. Eckhardt: The night of the 29th.

Mr. D'Unger: Was it the 29th?

Mr. Eckhardt: Yes.

Mr. D'Unger: Stand corrected.

Q. Is this the resolution that was adopted by that body on the night of May 29th, 1945?

A. It is.

Q. Mr. Major Siler who drafted this resolution?

A. I don't know.

Q. Was the resolution reduced to writing before it was acted on?

A. The best of my remembrance the resolution was presented to the Council in written form.

Q. Was it written in longhand or typewritten?

A. I couldn't say definitely.

[fol. 287] Q. Was it by any chance dictated to the secretary, Mr. Vickery, and reduced to writing in longhand by him?

A. Unless I had the minutes of that meeting I couldn't state. I believe it was but I am not certain.

Q. I hand you herewith the Minutes for the purpose of refreshing your memory.

A. The Minutes of this meeting state the resolution was read by the secretary. Well, it must have been already prepared.

Q. The Minutes from that meeting read that you made the motion, "* * * that due to the extreme emergency, demanding immediate action by the Council, that the members present proceed with any necessary business and that the actions of this date, of this Council be presented to the respective Veterans' Organizations for approval and confirmation." You didn't dictate the resolution to Mr. Vickery yourself?

A. No.

Q. And if Mr. Vickery has so testified he is wrong about that?

A. I believe so.

Q. Now, this resolution states that the body conducted a

full investigation of this matter before they adopted this resolution. What was the nature of that investigation?

A. I have no information. I didn't conduct the investigation myself.

Q. But you did vote to adopt the resolution stating that a full investigation had been made?

A. I did.

Q. Was there any report made of the findings as a result of that investigation?

A. If so it was verbal.

Q. Do you recall whether there was a verbal report made?

A. Not as a formal report of investigation.

Q. Well what do you recall as having been reported on that occasion?

A. I couldn't testify as to what was reported because [fol. 288] it would be purely a matter of memory.

Q. I asked you what you recalled as having been reported on that occasion as a result of this investigation?

A. I don't recall any specific matter that was reported.

Q. As a matter of strict fact there was no investigation ever made of that matter was there?

A. I don't know.

Q. You don't know?

A. Except that it was reported by members of the Council that the investigation had been made and at the time I had confidence in the men who made the report.

Q. You personally didn't go to the record in this case?

A. No sir.

Q. You are an attorney yourself, are you not?

A. No sir.

Q. What is your business?

A. I am a retired Army Officer.

Q. What are you presently engaged in?

A. I am an accountant.

Q. You are not engaged in abstracting?

A. No sir.

Q. Oh, pardon me. I thought you were. You didn't, however, make any investigation of the record?

A. No sir.

Q. Did you know at the time that this resolution was adopted that the check which figured so prominently in the newspaper stories was a post-dated check?

A. No sir. I hadn't read the newspapers. I have been very busy with a number of things for the last couple of months and only on very rare occasions do I get to read the newspapers at all.

Q. Do you know one of the parties plaintiff in this suit was a Lieutenant in the United States Army?

A. No sir.

[fol. 289] Q. So if the record in this case shows that the check in the case was post-dated and that one of the plaintiffs was a Lieutenant in the United States Army, then you were not in possession of all of the facts when this resolution was adopted, is that right?

A. No, I wasn't in possession of all of the facts.

Q. So this bit about the full investigation is just a bit of exag-eration, isn't it?

A. Not necessarily so because — may have been many facts brought out by the investigation that weren't presented to me at that meeting.

Q. What facts were you in possession of at that meeting? What facts did you know?

A. The fact that was brought to my attention was that the investigation which had been made by other members of the Soldiers' and Sailors' Advisory Council seemed to show that an enlisted man in the Army was in need of help, and that is the prime purpose of that.

Q. You say the investigation made by other members of the Council, again, what was that investigation and who made it?

A. I don't know.

Q. You just stated the investigation seemed to show, what investigation?

A. The investigation that is referred to in the report, in the Minutes of the Council.

Q. The fact that it is referred to in here. That is exactly what I am trying to get at. What was the investigation referred to in this resolution?

A. There were approximately, as well as I remember, about eight or nine present at that meeting. Several referred to this investigation as having been made. May I have the list of those present.

Q. I will ask you if those Minutes reflect that any report was made?

A. The Minutes don't refer to the report except as to an

investigation. I believe the paper that you have there refers to the investigation.

[fol. 290] Q. It is all there.

A. I can tell you from this list of those present a certain one, two or three who referred to the investigation in my hearing as having been made. I took their word for it.

Q. Who were those three people? Identify them for me.

A. I believe Mr. Wolford, no. I believe Mr. Bonner referred to the investigation. I believe Mr. Wolford referred to *a* it. I believe Mr. Daly referred to it, and I am quite certain that Mr. Vickery referred to it. Knowing those men, having worked with them for a number of years, I didn't question any facts they brought before the Council.

Q. Mr. Major Siler it is in evidence that Mr. Bonner testified he made no investigation and knew nothing of any investigation. It is in evidence that Mr. Wolford testified that he made no investigation and knew nothing of any investigation.

Mr. Eckhardt: I don't believe that is in evidence that way.

Mr. D'Unger: May the Reporter read the record.

Mr. Eckhardt: As the question and I will state my objection.

Q. It is in evidence that Mr. Daly made no investigation and knew nothing of any investigation. It is in evidence that Mr. Vickery has testified he made no investigation and knew nothing of any investigation. Now, what is your testimony concerning the report of the investigation?

Mr. Eckhardt: We object to the question as stated in the particular language because it doesn't correctly state the testimony.

The Court: Doesn't what?

Mr. Eckhardt: Not accurately stating the testimony.

Mr. D'Unger: I have to abide by the record. Let the Reporter read the record.

The Court: Whose testimony do you want?

[fol. 291] Mr. Eckhardt: I don't want anybody's. I object to the question as a conclusion in the question from the testimony adduced here. The record will speak for itself on that.

Mr. D'Unger: I believe Mr. VanDresar took all of that testimony with the exception of the last portion of Mr. Bonner's testimony.

The Court: Sir?

Mr. Eckhart: I am just making the objection.

The Court: To what?

Mr. Eckhardt: That the question draws a legal conclusion from the evidence adduced here by the witnesses.

Mr. D'Unger: Perhaps I don't understand his objection. What is his objection, these witnesses didn't say.——

Mr. Eckhardt: My objection speaks for itself.

Mr. D'Unger: If the Court please, the objection is still not clear and furthermore, it is not a valid objection.

Mr. Eckhardt: We will let the record speak for itself.

Mr. D'Unger: I will reframe the question.

Mr. Eckhardt: If it isn't valid why reframe it?

Mr. D'Unger: Because as I understand your objection is isn't in the langauge of the testimony.

Q. Mr. Siler, if these four men whom you have mentioned have testified in substance here that they made no investigation and knew nothing of any investigation, are they wrong in their testimony?

Mr. Eckhardt: Let us have the same objection we had before? That doesn't correctly state the testimony.

The Court: Objection overruled.

Mr. Eckhardt: Note the exception.

A. What is the question, please?

A. If Mr. ——

Mr. Eckhardt: Let him read that question.

[fol. 292] (Question was read by the Court Reporter.)

A. I don't know.

Q. Well now, do you still say, Major Siler, that these four men did report the results of an investigation *of* mention the results of an investigation?

A. I believe you will find that my testimony was that these four men, possibly others, referred to an investigation having been made.

Q. Major Siler, I will have you herewith a photostatic copy of the Corpus Christi Caller for May 29th, and direct your attention to this portion headlined, "Browning's Ruling Prompts Vets Meeting."

Mr. Eckhardt: Speak a little louder.

Mr. D'Unger: I merely direct his attention to an exhibit and story.

Mr. Eckhardt: What issue?

Mr. D'Unger: May 29th of the Corpus Christi Caller.

Q. Read to yourself, Major, just the first two or three paragraphs there. Just glance at them. Acquaint yourself with the contents.

A. All right. You want to ask me something about this?

Q. Yes sir. Have you read it?

A. Sufficient of it.

Q. Major ~~Siler~~, do you know who furnished the newspaper with that information?

A. Not only I don't know who furnished the information, but this is the first time I have ever seen this particular issue of the paper.

Q. I will ask you whether or not that particular story was discussed at the meeting at which this resolution was adopted?

A. Not to my knowledge.

Q. Were you present throughout the entire course of the meeting?

A. I was present throughout the entire course of the meeting, but the meeting was very informal and it frequently happened that two or three were discussing some point on one side of the room and others on the other side of the room.

[fol. 293] Q. Were you discussing points involved in this Mayes case?

A. Well, I presume so.

Q. You don't recall?

A. There was a number of us that hadn't seen each other for quite long intervals; some I hadn't seen for over a year, and we talked of other things.

Q. As a matter of fact your body hadn't met for some four years prior to this occasion?

A. At least I hadn't been at such a meeting.

Q. Beg your pardon.

A. I hadn't been at such a meeting subsequent to the original formation of it.

Q. Who called you about the meeting?

A. I'm not certain. I think it was Mr. Daly.

Mr. Eckhardt: In the interest of time can't we eliminate those questions. They are immaterial; just going on here.

Mr. D'Unger: If the Court please, we are in here to try this case——

Mr. Eckhardt: Yes sir, on the issues.

Mr. D'Unger: And I propose to try it squarely on the issues.

Mr. Eckhardt: I maintain this is going far afield, and I would like to see if we can't confine ourselves to the issues. What has that to do with it, how long since they had met?

Mr. D'Unger: The purpose is this, Your Honor, to show and let the record show the sensational manner in which this story was handled by the Caller-Times, the Caller and the Times to arouse this public opinion to a point to where it did embarrass this Court and obstruct the administration of justice.

Mr. Eckhardt: Now, all counsel is developing is squarely on the question of law. The testimony was adduced, and [fols. 294-298] the reports are in evidence and they are all questions of law; but counsel wants to bring that out through the witness.

Mr. D'Unger: The Appellate Courts have no way of gauging public opinion in Corpus Christi during those last few days in May.

Mr. Eckhardt: Is it counsel's contention that the Appellate Court will have to weight the matter of public opinion? I don't want to sit down and be overruled. That is not an issue in this case at all.

Mr. D'Unger: Well, that is all, Major.

The Court: Just a minute. Mr. Eckhardt, do you have any questions?

Mr. Eckhardt: No, I don't.

The Court: Gentlemen, you are through with Major Siler?

Major, you will be excused.

The Witness: Thank you.

The Court: Gentlemen, we will recess until 1:30 this afternoon.

(Whereupon the court recessed until 1.30 o'clock P. M., August 2, 1945, at which time trial of the cause continued as follows:)

. . . . . .

[fol. 299] Mr. D'Unger: At this time we will introduce the stipulations which have been filed in this cause, I guess this will be a joint offer——

Mr. Eckhardt: Yes sir, jointly; both of us will introduce that.

(Whereupon the instrument contain- such stipulations was marked by the Reporter for identification as "Ex. 16, St. & Respondents", and is, in words and figures, as follows:)

. . . . . .

---

[fol. 300] EXHIBIT NO. 16, STATE AND RESPONDENTS

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3636

In the Matter of CONWAY C. CRAIG, BOB MCCRACKEN and TOM MULVANEY

STIPULATION

It is hereby agreed and stipulated by Jerry D'Unger, Special County Attorney appointed to represent the State of Texas, in the above numbered and entitled cause, and M. G. Eckhardt, counsel for the Respondents, Conway C. Craig, Bob McCracken and Tom Mulvaney, that the facts set forth herein are undisputed and are true and correct, and are to be considered a part of the record in this case:

1. That on the 20th day of April, 1945, under Docket No. 5095, there was filed in Justice Court, Precinct 1, Place 2, Nueces County, Texas, a complaint charging Joe L. Mayes and F. F. Burchard with the forcible detainer of certain premises located in the City of Corpus Christi, County of Nueces and State of Texas. The said complaint reciting:

> "Now come B. M. Jackson, Franklin Flato, Frederick Flato, Robert Flato and Harry G. Heany, hereinafter called plaintiffs, and file this complaint against Joe L. Mayes and F. F. Burchard, hereinafter called defendants."

That the defendants named in said complaint filed their answer therein on the 3rd day of May, 1945, and that the

said cause was tried and adjudicated on the 3rd day of May, 1945, and judgment rendered for plaintiffs, as follows:

IN THE JUSTICE COURT, IN AND FOR PRECINCT NO. 1, PLACE NO. 2, OF NUECES COUNTY, TEXAS

No. 5095

B. M. JACKSON, et al.

vs.

JOE L. MAYES, et al.

[fol. 301] JUDGMENT

This, the 3rd day of May, 1945, came on to be heard the above entitled and numbered cause in the above mentioned Court, and came the defendant, Joe L. Mayes, by his attorney, LeGrand Woods, and presented his motion for continuance, based upon the Soldiers' and Sailors' Civil Relief Act, and the court having considered said motion and argument of counsel thereon, finds that the ability of the defendant to conduct his defense in this cause is not materially affected by reason of his military service and absence from the trial on account thereof, and said motion for continuance was by the court overruled, to which action of the court the defendant in open court excepted.

Thereupon all parties announced ready for trial, and a jury having been waived, the court heard the pleadings, the evidence presented by all parties, and the arguments of counsel, and having considered the same, and being of the opinion that the judgment should be in favor of the plaintiff.

It is, therefore, ordered, adjudged and decreed that B. M. Jackson, Franklin Flato, Frederick Flato, Robert Flato and Harry G. Heaney, plaintiffs, have restitution, for which let writ issue, of the premises described in their complaint, to-wit:

The ground floor of that building known as the Elks Club Building, being at 701 Water Street, on the northwest corner of Starr and Water Streets in Corpus Christi, Nueces County, Texas, and all costs of suit, for which let execution issue; to which judgment Joe L. Mayes and F. F. Burchard, defendants, then and there in open court excepted, and

gave notice of appeal to the County Court of Nueces County, Texas.

(Signed) Carl Crow.

Carl Crow, Justice of the Peace, Precinct No. 1, Place No. 2, Nueces County, Texas.

[fol. 302] That thereafter, on the 7th day of May, 1945, an appeal bond was duly filed by the defendants, and a transcript of the proceedings was prepared on the 10th day of May, 1945, and directed to the Clerk of the County Court of Nueces County, Texas, the said transcript bearing the following file mark:

"Filed May 10, 1945. Mrs. Henry F. Gouger, County Clerk, Nueces County, Texas, by Claudine Toups, Deputy."

In connection with this stipulation, it is agreed that any of the papers in Cause No. 5095 in the Justice Court in and for Precinct No. 1, Place No. 2, of Nueces County, Texas, may be offered in evidence in the instance cause by either party thereto, subject to valid objections to be made at the time of such proffer.

2. That on the 10th day of May, 1945, there was filed in the County Court of Nueces County, Texas, under Docket No. 3624, the same complaint which had been filed in Justice Court for Precinct No. 1, Place No. 2, of Nueces County, Texas, under Docket No. 5095, the said complaint containing the recitation as to plaintiffs and parties defendant referred to in paragraph 1 hereof. That thereafter the defendants duly filed answers to the said complaint, and that on the 21st day of May, 1945, the County Court of Nueces County, Texas, was called for a regular session, and Cause No. 3624, wherein B. M. Jackson, Franklin Flato, Frederick Flato, Robert Flato and Harry G. Heaney were plaintiffs, and Joe *I.* Mayes and F. F. Burchard were defendants, was set down for trial on the 25th day of May, 1945, and that thereafter the same came on for trial on the 25th day of May, 1945, and both sides having announced ready, a jury was duly empanelled, the said trial continuing throughout the days of May 25th and May 26th. That the testimony in said cause was closed late in the afternoon of May 26, 1945, [fol. 303] and the entire facts adduced at the said trial

before the County Court being truly and accurately reflected in the transcript filed herein as "Exhibit A", such transcript containing the oral testimony of all the witnesses, in question and answer form, and also containing all the documentary evidence offered and admitted in the cause, and likewise, the objections of counsel to the evidence and the rulings of the court thereon, had the trial of said cause.

That subsequent to the return of the verdict by the jury at approximately 9:00 o'clock a. m. on the 27th day of May, 1945, which verdict was instructed by the Court, judgment was rendered and entered for plaintiffs, as follows:

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3624

B. M. JACKSON, et al.

vs.

JOE L. MAYES, et al.

On the 25th day of May, A. D., 1945, came on *the* be heard the above entitled and numbered cause on appeal from the Justice Court in and for Precinct No. 1, Place 2, Nueces County, Texas, and came all the parties, the plaintiffs in person and by their attorneys, and the defendants in person and by their attorneys, and announced ready for trial; whereupon a jury of six true and lawful men, who having been tested, were duly sworn and impaneled to try the case, said jury consisting of A. D. Kirk, Foreman, and five others; thereupon the pleadings were read to the jury, both plaintiff and the defendant, and the Court and jury proceeded to hear the testimony until the 26th day of May, A. D. 1945;

7

(Note: The "7" being written with pen and ink over the typwritten "6" in the "26th.")

Whereupon the plaintiff rested and the defendants having filed a motion for instructed verdict, which motion after being heard by the Court was carried under advisement until the conclusion of all of the testimony; whereupon the [fol. 304] defendants offered their testimony, and all parties having closed the case on the evidence, and the plain-

tiffs having moved the Court for an instructed verdict; thereupon after having heard the motion of both plaintiff and defendant for instructed verdict, the Court overruled the defendants' motion and granted plaintiffs' motion, and the jury having been instructed by the Court so to do returned into open court their verdict as follows:

> "We, the jury, find for the plaintiff and against the defendant."

Thereupon the Court having considered said verdict and the pleading and the evidence is of the opinion that judgment herein should be rendered in favor of the plaintiff for the recovery of the possession of said property and for restitution of the premises and costs.

It is, therefore, hereby, ordered, adjudged and decreed that B. M. Jackson, Franklin Flato, Frederick Flato, Robert Flato, and L. G. Heaney, plaintiffs, have and recover possession and the restitution of possession, for which let Writ issue, on the premises described in their complaint, to-wit: the ground floor of that building known as the Elks Club Building, and being at 701 Water Street on the northwest corner of Starr and Water Streets in the City of Corpus Christi, Nueces County, Texas; and

It is further ordered, adjudged and decreed that the plaintiffs do recover of defendants all costs in this behalf expended for which let execution issue.

(Signed) Joe D. Browning, County Judge, Nueces County, Texas.

(in pen): 5-27-45.

And thereafter the County Judge, on the 9th day of June, 1945, before the end of the same regular session at which the said cause was tried, amended the said judgment, as follows:

[fol. 305] IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3624

B. M. JACKSON, et al.,

vs.

JOE L. MAYES, et al.

Be it remembered that on this the 9th day of June, 1945, in the above styled and numbered cause, the Court having discovered a mistake in the entry of judgment, as indicated thereon, as of date May 27, 1945, which was Sunday; and

It appearing to the Court that such mistake occurred by reason of the fact that the verdict of the jury was received on Sunday, the Court is of the opinion that the judgment should be amended so as to show the true date of entry, Monday, May 28, 1945; and

It further appearing to the Court that the verdict of the jury, as copied in the judgment, failed to include in it the return of the verdict on order of the Court, the Court is of the opinion that said judgment should show the correct quotation of the verdict, and that said judgment should be amended so as to read:

> "We, the jury find as ordered by the Court in favor of the plaintiff and against the defendant.
>
> (Signed) A. D. Kirk, Foreman of the Jury."

It is therefore hereby ordered, adjuded and decreed that said judgment be amended so as to show the true date of entry thereof, May 28, 1945, and so as to show the correct form of verdict returned by the jury.

Done before the adjournment of Court at the term in which said cause was tried, on this the 9th day of June, 1945.

(Signed) Joe D. Browning, Judge, County Court, Nueces County, Texas.

[fol. 306] That on the 29th day of May, 1945, the defendants, Joe L. Mayes and F. F. Burchard, timely filed their motion for a new trial. That the said motion was set down for hearing on the 6th day of June, 1945, at which time the motion was heard and denied, after a day long argument by counsel for both sides. In this connection, the Court

overruled the motion for a new trial by written order, reading as follows:

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3624

BUSH L. JACKSON, et al.

vs.

JOE L. MAYES, et al.

Be it remembered that on this, the 6th day of June, 1945, came on to be heard the Defendants' motion for new trial in the above styled and numbered cause, which was set for this date on notice to all parties; and came the defendant, Burchard and his attorneys of record, who appeared for him and his co-defendant, Joe L. Mayes, and came the plaintiffs by their attorneys, and announced in open Court that they were ready to proceed with the hearing of the motion for new trial filed by the defendants. Whereupon said motion was submitted to the Court and argued by the attorneys both for the defendants and for the plaintiffs, and the Court, after hearing extended arguments of all parties, and after having fully considered the said motion and argument in support thereof, and the arguments in answer thereto, is of the opinion that said motion should in all things be overruled. It is, therefore, hereby Ordered, Adjudged and Decreed that defendants' motion for a new trial in the above styled and numbered cause be, and the same is hereby overruled.

(Signed) Joe D. Browning, Judge Presiding.

In connection with the order overruling the motion for new trial, the Judge made this typewritten decision upon [fol. 307] the motion which was filed with the papers in the case, such memoranda decision being as follows:

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3624

BUSH M. JACKSON, et al.

vs.

JOE L. MAYES, et al.

The sole issue is whether the defendant complied with the terms of the option. The evidence is undisputed that he did not, but that he tendered a check for $250.00, which was refused, and later tendered a check for $275.00, which was post-dated one month. This and other facts causes me to render a decision overruling the motion for new trial.

(Signed) Joe D. Browning, Co. Judge.

3. At the conclusion of plaintiffs' testimony and after plaintiffs had rested, the defendants filed a motion with the Court on the 26th day of May, 1945, praying the Court to instruct the jury in said cause to return their verdict in favor of the defendants, said motion reading as follows:

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. —

B. M. JACKSON, et al.

vs.

JOE L. MAYES, et al.

Come now the defendants in the above styled and numbered cause, at the close of the plaintiffs' case in chief, and now respectfully pray the court to instruct the jury in this cause to return their verdict herein in favor of these defendants, and as ground therefor, respectfully show unto the court as follows:

I

Because the undisputed proof in the record discloses that the option provision in the lease does not provide for any time or manner for the exercising thereof, and that, re- [fol. 308] gardless of the truth or falsity of the testimony of the defendants that they gave notice of their intention to exercise such option in December, 1944, still and never-

theless the undisputed evidence discloses that they continued to hold possession of the premises after the expiration of the original one-year period of time, and that within a reasonable time thereafter, they did inform the plaintiffs of their election to exercise such option, and mad- a tender of the rentals provided to be paid under the terms thereof, and, therefore, such option was actually exercised, and the second year term of the lease commenced to run on March 14, 1945.

Further, since it affirmatively appears, by the undisputed evidence aforesaid, that said option of renewal was actually exercised, the question of whether the rentals provided to be paid under the terms thereof were or were not promptly tendered and/or offered to be paid, is wholly irrelevant, and the plaintiffs are not entitled to attempt to declare a forfeiture of the rights vested in the defendants under the terms of said contract, for alleged nonpayment of rentals on or before March 15, 1945, for the following reasons:

First, because the lease provides for the rentals to be paid on or before the 1st day of each month, and not the 15th day of each month, and therefore, under the express provisions of the lease itself, the defendants were not required to pay or make any tender of payment until on or before April 1, 1945;

Second, because the written lease contract does not contain any provision for the right of forfeiture therein granted plaintiffs, in the event of non-payment of any rental, to be exercised by them without a formal demand for the payment of any rent claimed to be in default having been first made by the plaintiffs, as provided, and since the undisputed evidence discloses that the plaintiffs have never at any time demanded any rent from the defendants, and have at all times consistently refused to accept any rentals, [fol. 309] and have consistently done so at all times prior to attempting to declare the default relied upon by the plaintiffs, such right of forfeiture does not exist, and the undisputed evidence, therefore, discloses that the lease is in full force and effect, and that these defendants are entitled to an instructed verdict, and for which relief they now respectfully pray the court.

Respectfully submitted, LeGrand J. Woods, Kemp, Lewright, Dyer, Wilson & Sorrell. By (Signed) W. M. Lewright, Attorneys for Defendants.

After hearing extensive argument from the defendants' counsel on the motion, as well as from plaintiffs' counsel in reply thereto, the Court took the motion under advisement, stating:

"I think I will rule on the motion after I have heard the defense."

The Court likewise stating that he would rule on the motion after the defense had closed.

At the conclusion of the testimony, and after both sides had rested, plaintiffs filed their motion for an instructed verdict on the 26th day of May, 1945, which motion reads as follows:

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

"No. 3624

B. M. JACKSON, et al.

vs.

JOE L. MAYES, et al.

To the Honorable Joe D. Browning, County Judge:

Come now plaintiffs in the above styled and numbered cause at the close of the testimony in said cause, both parties having closed, and respectfully pray the Court to instruct the jury in this cause to return a verdict herein in favor of the plaintiffs, and for grounds thereof would respectfully show:

[fol. 310] 1. Because the undisputed proof and the record disclose that the option provision in the lease was never exercised by the plaintiff within the manner provided for in the lease.

2. Because the undisputed evidence shows that defendant is seeking to hold the property without any legal right to the possession thereof in contradiction to the terms and provisions thereof.

3. Because under the express provisions of the option agreement, which made the terms of the lease applicable to the option, and under the terms of the lease, paragraph 6, that the lease and option had expired.

Wherefore, premises considered, these plaintiffs pray the Court to instruct the jury to return a verdict in favor of the plaintiffs.

Respectfully submitted, (Signed) B. D. Tarlton, Attorney for the Plaintiffs."

No oral argument was had on the plaintiffs' motion for instructed verdict, but the Court announced in open Court that he had decided to instruct a verdict in favor of the plaintiffs and against the defendants upon plaintiffs' motion therefor. Whereupon Walter M. Lewright, one of the attorneys for the defendants, remarked:

"Do I understand that Your Honor is going to arbitrarily grant Mr. Tarlton's one-page motion, without argument?"

4. The jurors selected and empaneled to try said cause were as follows:

A. D. Kirk, Foreman; I. Hyam, W. G. Douglass, William A. Owen, Irwin B. Meyers and H. G. Wernette.

[fol. 311] That prior to retiring, the Court handed the jury the following typewritten charge and form of verdict:

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3624

B. M. JACKSON, et al.

vs.

JOE L. MAYES, et al.

CHARGE OF THE COURT

GENTLEMEN OF THE JURY:

The Court having determined that a motion for an instructed verdict made by the plaintiff should be granted herein, you are instructed as a matter of law in this case to return your verdict in favor of the plaintiff and against

the defendant. For your convenience a form of verdict is submitted, and you will let your verdict be:

We, the jury, find in favor of the plaintiff and against the defendant.

———, Foreman of the Jury.
———, County Judge, Nueces County, Texas.

Subsequently, the jury returned with the form of verdict given to them by the Court with the insertions written in pen and ink, reading as follow:

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3624

B. M. JACKSON, et al.

vs.

JOE L. MAYES, et al.

CHARGE OF THE COURT

GENTLEMEN OF THE JURY:

The Court having determined that a motion for an instructed verdict made by the plaintiff should be granted herein, you are instructed as a matter of law in this case to return your verdict in favor of the plaintiff and against [fol. 312] the defendant. For your convenience a form of verdict is submitted; and you will let your verdict be:

We, the jury, find in favor of the [plaintiff]* and against the [defendant].*
plaintiff defendant

(Signed) A. D. Kirk, Foreman of the Jury.
———, County Judge, Nueces County Texas.

The verdict was filed on the same day with the papers of the case. Immediately thereafter the Court prepared the following form of instructed verdict, which was wholly

* Word enclosed in brackets erased in copy.

typewritten, to be signed by the Foreman of the jury, which charge of the Court reads as follows:

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3624

B. M. JACKSON, et al.

vs.

JOE L. MAYES, et al.

CHARGE OF THE COURT

GENTLEMEN OF THE JURY:

The Court having determined that a motion for an instructed verdict made by the plaintiff should be granted herein, you are instructed as a matter of law in this case to return your verdict in favor of the plaintiff and against the defendant. For your convenience a form of verdict is submitted, and you will let your verdict be:

We, the jury, find in favor of the plaintiff and against the defendant.

——— ———, Foreman of the Jury.

——— ———, County Judge, Nueces County, Texas.

Subsequently the jury returned with the form of verdict [fol. 313] given them by the Court, with the insertions written in pen and ink, reading as follows:

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3624

B. M. JACKSON, et al.

vs.

JOE L. MAYES, et al.

CHARGE OF THE COURT

GENTLEMEN OF THE JURY:

The Court having determined that a motion for an instructed verdict made by the plaintiff should be granted herein, you are instructed as a matter of law in this case

to return your verdict in favor of the plaintiff and against the defendant. For your convenience a form of verdict is submitted and you will let your verdict be:

Unanimous verdict on first ballot, in favor of the defendant.

We, the jury, find in favor of the [plaintiff]* and
defendant
against the [defendant].*
plaintiff

(Signed) A. D. Kirk, Foreman of the Jury
——, County Judge, Nueces County, Texas.

The last above returned verdict of the jury was brought in at about 9:30 o'clock p. m., Saturday, May 26, 1945. As the jury was retiring the second time, at the request of the Judge, A. D. Kirk, the foreman of the jury, halted on the way from the jury box and requested the Court if he might ask the Court a question. Counsel in the case raised the point that the question should be in writing, but subsequently all agreed that they would waive that formality and would agree that the juror may ask the question of the Court orally. Thereupon, the juror, A. D. Kirk, asked this question:

[fol. 314] "When we have a unanimous vote, do we have to go by the instructions against our conscience? We, of the jury, swore to listen to the evidence and find according to our conscience."

Judge Browning thereupon prepared a typewritten response to the question submitted by the foreman, under waiver, such response being filed in typewritten form on May 26, 1945, and reading as follows:

"In response to your question submitted by your foreman under waiver. You are instructed that when the Court determines that an Instructed Verdict shall be granted no fact remains in the case for the jury to pass upon. The only duty you have then is to follow the law and return the verdict for the party as directed. This instruction to return the verdict for the plaintiff

* Word enclosed in brackets erased in copy.

is the law of the case, which the judge alone can determine.

(Signed) Joe D. Browning, County Judge, Nueces County, Texas.

In connection with the foregoing stipulation relative to the instructed verdict directed by the Court to the jury, and the return thereof by the jury, on the occasion and in the circumstances above set forth in Section 4 hereof, the remonstrances and colloquies between the juror, A. D. Kirk, and another juror, with the Court, and also the speeches and statements addressed to the jury and to the Court by Walter M. Lewright, counsel for defendants, and B. D. Parrish, counsel for the plaintiffs, and statements and remarks made by Joe D. Browning, County Judge, to the members of the jury and counsel, all as contained in Exhibit C-T-27, being the issue of the Corpus Christi Caller-Times published on Sunday, May 27, 1945, on pages 1 and 8, styled "Jury Defies order by Browning for Directed [fol. 315] Verdict", and also in Exhibit C-28, being the issue of the Corpus Christi Caller of Monday morning, May 28, 1945, as contained on pages 1 and 3, are substantially correct.

The Court submitted to the jury still a third typewritten form for the return of the verdict, reading as follows:

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3624

B. M. JACKSON, et al.

vs.

JOE L. MAYES, et al.

CHARGE OF THE COURT

GENTLEMEN OF THE JURY:

The Court having determined that a motion for an instructed verdict made by the plaintiff should be granted herein, you are instructed as a matter of law in this case to return your verdict in favor of the plaintiff and against

the defendant. For your convenience a form of verdict is submitted, and you will let your verdict be:

> We, the jury, find as ordered by the court in favor of the plaintiff and against the defendant.
>
> ——— ———, Foreman of the Jury.
>
> (Signed) Joe D. Browning, County Judge, Nueces County, Texas.

And the Court thereupon read the charge to the jury and left it with the foreman of the jury. The jury went back to the jury room without comment, and ten minutes later Judge Browning called the jurors in again to inform them that if they were unready to reach a verdict the Court would convene at 9:00 a. m. Sunday, May 27th, 1945. Whereupon the jurors retired with the bailiff. The jury did not return a verdict until Sunday morning at 9:00 a. m., May 27, 1945, at which time they returned a verdict in accordance with the Judge's instructions on the form prepared, with [fol. 316] the added notation in pen and ink, signed by the foreman, A. D. Kirk, which notation reads as follows:

> "It to be understood that this verdict is rendered recorded with the orders of this Court against the conscience of this jury. A. D. Kirk, Foreman."

The Court received the verdict last above mentioned and ordered it filed, and, at the request of counsel for the defendants, permitted the notation placed thereon by the foreman of the jury, as above stated, to remain thereon.

In this connection it is also agreed and stipulated that from the time the jury was empaneled and placed in the box on the morning of the 25th day of May, 1945, until they retired to deliberate, at approximately 7:00 p. m. Saturday, the 26th day of May, 1945, they were under no restraint, beyond the customary admonition from the Court that they were not to discuss the case with anyone or discuss it among themselves, but that they were permitted to return to their homes for their meals and to spend the night of the 25th day of May in their respective homes, and were not placed in charge of a bailiff of the Court until approximately 7:00 p. m. of the 26th day of May, 1945.

5. On the morning of May 27th, 1945, about 9:30 A. M., after the jury had left the room, Judge Browning spoke in substance and effect, these words, before the lawyers,

B. D. Tarlton, Walter Leyright and LeGrande Woods, and Miss Marie Kelly Young, Deputy Clerk:

> "Now, I want the newspaper man who has been writing all these stories in the newspapers to put this in: that he told me out there last night that I was committing political suicide when I granted the motion for instructed verdict."

or words to that effect. While speaking, Judge Browning indicated that he meant the respondent, Mulvaney. Whereupon, Mulvaney arose and denied that he had made any such statement, and requested of the Judge when and where [fol. 317] such a statement had been made. To this request, Judge Browning answered:

> "Oh, you know where—out there last night."

To this statement by the Judge, respondent Mulvaney replied in words to this effect:

> "Judge, you must know that I made no such statement to you last night, or any other time. I am too long in this business ever to make such an injudicious and fool statement, and, the only thing I said to you that was remotely closely to what you have quoted was, after the jury had twice refused to sign the verdict, I remarked to you: 'Judge, it looks as though you have lost six good men and true.'"

Respondent Mulvaney then again denied, before the entire group, that he had made such a statement, and requested a retraction. Thereupon Miss Marie Kelly Young arose and made this statement, in substance and effect:

> "Why, Judge, that was Mr. Woods (referring to associate counsel LeGrande Woods for defendant, Mayes) who said that to you last night."

Judge Browning thereupon said, in words to this effect:

> "Al- right, let it go."

6. The Caller-Times Publishing Company is a corporation duly incorporated under the laws of this State, having its principal office and place of business in the City of Corpus Christi, County of Nueces, State of Texas. It owns and causes to be published, under due and proper permit,

three publications, namely: (a) The Corpus Christi Caller, a morning newspaper; (b) The Corpus Christi Times, an afternoon newspaper, both of such publications being daily newspapers of general circulation in the City of Corpus Christi and County of Nueces; and, (c) The Corpus Christi [fol. 318] Caller-Times, being a Sunday newspaper of general circulation in the same City and County.

7. Conway C. Craig, one of the respondents herein, is the Publisher of the Corpus Christi Caller, the Corpus Christi Times, and the Corpus Christi Caller-Times, and as such has general supervision and control over and directs the business affairs of the corporation and its several newspaper publications. He does not edit or write editorials, nor compose news stories or articles in any of said newspapers so published. Respondent, Craig, was acting in the capacity and status of Publisher of the several newspaper publications during all the times and occasions mentioned in the decree and the accompanying affidavit, and during the whole month of May, 1945. The Respondent, Craig, did not write the news articles or news stories, or the column published in the Corpus Christi Caller dated May 30th, 1945. Such news articles and stories being contained in the hereinafter mentioned exhibits. Respondent, Craig, did not know of the nature or contents of the various publications, and the Crow's Nest Column published May 30th, 1945, until after the publication thereof, though he did read such newspaper articles, as well as The Crow's Nest column, after the same appeared in the several newspaper publications above referred to. The newspaper articles and The Crow's Nest column complained of in the information are contained in their entirety, respectively, in the following exhibits, hereinafter more particularly set forth, namely: Exhibits Nos. C-26, T-26, CT 27, C-28, T-28, C-29, T-29, C-30, T-30 and C-31.

8. Respondent, Bob McCracken, is Managing Editor of the several newspaper publications hereinafter mentioned, and he writes the column called The Crow's Nest, in the Corpus Christi Caller, and Corpus Christi Caller-Times. Respondent McCracken is a full-time employee in the above stated capacity, of said Caller-Times Publishing Company, and among other duties, is called upon to write the column [fol. 319] called The Crow's Nest. This column, though

written for such publications by respondent, McCracken, contains at the foot this notice, in substance and effect:

> "This column is written for the Caller (or the Caller-Times) by Bob McCracken. Opinions expressed are those of the writer, and do not necessarily reflect the policy of this newspaper."

and the space wherein this editorial column is published is not purchased from the newspaper by the respondent, McCracken, or any other person. Respondent, McCracken also writes other editorial for the several newspapers published by the Caller-Times Publishing Company. Among other things, he also has general supervision over all news writings and stories prepared and written by the various reporters for the three newspaper publications for which he is Managing Editor. During all of the times and occasion referred to in the decree and the accompanying affidavit, as well as during the entire month of May, 1945, he was acting in the above described capacities and status. Respondent, McCracken, did not write the news articles complained of in the information and set forth in the decree, though he knew that such articles were being written by the respondent, Tom Mulvaney.

9. Respondent, Tom Mulvaney, is a news writer and news reporter for the three following newspaper publications, namely: The Corpus Christi Caller, The Corpus Christi Times, and The Corpus Christi Caller-Times. As such he writes news reports and news stories or narratives, including especially the news reports in connection with the trial and disposition of cases in all of the State Courts holding terms in Corpus Christi, Texas, and also the United State District Court for the Southern District of Texas, when sitting in Corpus Christi, Texas. Respondent, Tom Mulvaney, did not write the column called The Crow's Nest, [fol. 320] appearing in the issue of The Corpus Christi Caller of May 30th, 1945, nor did he know of its contents until after he read the same in the newspaper immediately after such issue of the paper was published. Respondent, Mulvaney, does not write, nor does he have any control or supervision over the column called The Crow's Nest, which is written exclusively by Respondent, Bob McCracken, and is under his supervision and control. During all the times and occasions referred to in the decree and

the accompanying affidavit, as well as during the entire month of May, 1945, he was acting in the above described capacity and status as news writer in respect to the news publications contained in their entirety in the last above referred to exhibits.

10. As a part of this stipulation, the following exhibits are referred to and made a part hereof, just as if written herein:

Exhibit C-26, being a true and correct photostatic copy of the first page of Section B of the original publication of the Corpus Christi Caller of Saturday, May 26th, 1945.

Exhibit T-26, being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Times of Saturday, May 26th, 1945.

Exhibit C-T-27, being a true and correct photostatic copy of the first and eighth pages of the original publication of the Corpus Christi Caller-Times of Sunday, May 27th, 1945.

Exhibit C-28, being a true and correct photostatic copy of the first and third pages of the original publication of the Corpus Christi Caller of Monday, May 28th, 1945.

Exhibit T-28, being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Times of Monday, May 28th, 1945.

Exhibit C-29, being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Caller of Tuesday, May 26th, 1945.

[fol. 321] Exhibit T-29, being a true and correct photostatic copy of the first and eighth pages of the original publication of the Corpus Christi Times of Tuesday, May 29th, 1945.

Exhibit C-30, being a true and correct photostatic copy of the first and eighth pages of the original publication of the Corpus Christi Caller of Wednesday, May 30th, 1945.

Exhibit T-30, being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Times of Wednesday, May 30th, 1945.

Exhibit C-31, being a true and correct photostatic copy of the first page of the original publication of the Corpus Christi Caller of Thursday, May 31st, 1945.

Exhibit A, being a true and correct transcript of all of the oral testimony in question and answer form, and all of the documentary evidence adduced at the trial of Cause Numbered 3624, styled Bush M. Jackson, et al, vs. Joe L.

Mayes, et al., in the County Court of Nueces County, Texas, May Term, 1945.

11. Honorable Joe D. Browning, County Judge of Nueces County, Texas, is not a licensed or practicing attorney of the State of Texas. Prior to Judge Browning's occupancy of the office of County Judge, he served for Eight (8) years as Justice of the Peace, Precinct 1, Place 2, of the County of Nueces, and he is presently serving his third elected term as County Judge of Nueces County, Texas, having been inducted into office on the 3rd day of Jan., 1941, and he is now the duly elected and acting County Judge of Nueces County, Texas.

12. On June 7th, 1945, there was filed in The Matter of Conway C. Craig, Bob McCracken and Tom Mulvaney, numbered 3626 in the County Court of Nueces County, Texas, relating to proceedings for contempt, an application on the part of Mr. Newt Wright, respectfully requesting the [fol. 322] Court, as relator in said cause, that the relator's attorney of record, Jerry D'Unger, be appointed Special Assistant County Attorney Ad Litem, for the sole purpose of prosecuting this cause in behalf of the State of Texas, such services to be rendered without compensation from Nueces County, Texas, and that the said attorney ad litem be ordered to participate in the trial of said cause. Upon this application the Court acted on the same day of entering the following order:

IN THE COUNTY COURT OF NUECES COUNTY, TEXAS

No. 3626

In the Matter of CONWAY C. CRAIG, BOB MCCRACKEN and TOM MULVANEY

On this, the 7th day of June, A. D., 0945, came on to be heard relator's application for the appointment of his attorney of record as Special Assistant County Attorney ad litem, for the sole purpose of prosecuting this cause in behalf of the State of Texas, and the defendants having had notice of said application and making no objection to the appointment sought;

It is, accordingly, ordered that the said Jerry D'Unger be, and he is hereby appointed Special Assistant County Attorney ad litem and ordered to prosecute said cause in

behalf of the State of Texas, such services to be rendered under this order without compensation from Nueces County, Texas.

Joe D. Browning, County Judge."

13. On May 30th, 1945, at 7:30 P. M., there was post, marked an envelope, having written on the left-hand corner the following:

"Ernest H. Gragg Post No. 81,
The American Legion,
1802 N. Chaparral St.,
Corpus Christi, Texas."

and in the middle of the envelope, this address appeared:

[fol. 323]

"Joe D. Browning,
County Judge,
Nueces Co. Court House,
City."

The envelope was received by the addressee on the morning of May 31st, 1945, and it contained the following copy of a resolution purported to have been passed by the Soldiers' and Sailors' Advisory Council, of Corpus Christi, Texas:

"Be It Resolved by the Soldier's and Sailor's Advisory Council of Corpus Christi, Texas, that it is the opinion of this organization, upon a full investigation, that the action of Joe D. Browning, County Judge of Nueces County, Texas, in instructing the jury in the case of Bush M. Jackson, et al., vs. Joe L. Mayes, et al., to return a verdict in favor of the plaintiffs, as was done by said judge on 27th inst., in the trial of said cause, was a gross miscarriage of justice against a member of the armed forces of the United States, and that said judge should be petitioned to grant the defendants in said action a new trial, and upon so granting said new trial in said cause, that said judge should disqualify himself to further sit as judge in said cause, and should permit the same to be retried before another judge and jury. The above and foregoing Resolution was duly presented, seconded and adopted.

Frank C. Bonner, Chairman.

Attest: Rex L. Vickerey, Secretary."

Said purported resolution is not a part of the record of any proceedings had in the trial and adjudication of Cause [fols. 324-326] Numbered 3624, styled Bush M. Jackson, et al., vs. Joe L. Mayes, et al., in the County Court of Nueces County, Texas.

14. It is expressly agreed and understood that this stipulation does not prevent either party from adducing other evidence in the trial of this cause, relevant and material to the issues in the cause, subject to all valid objections, provided that such evidence does not contradict the stipulation herein agreed upon.

Approved and Agreed Upon by and between the Special Assistant County Attorney ad litem, appointed for the purpose of prosecuting this cause in behalf of the State of Texas, and the attorney representing respondents, Conway C. Craig, Bob McCracken and Tom Mulvaney, this 31st day of July, A. D. 1945.

Jerry D'Unger, Special County Attorney ad litem, appointed for the purpose of prosecuring this cause in behalf of the State of Texas. M. G. Eckhardt, attorney for respondents, Conway C. Craig, Bob McCracken and Tom Mulvaney.

Approved and ordered filed as a part of the record in this cause, this 1st day of August, A. D. 1945.

Joe D. Browning, County Judge, Nueces County, Texas.

Endorsed: Filed Aug. 1, 1945. Mrs. Henry E. Gouger, County Clerk, Nueces County, Texas, by Claudine Toups, Deputy.

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[fol. 327] IN THE COUNTY COURT OF NUECES COUNTY

No. 3626

In the Matter of CONWAY C. CRAIG, BOB MCCRACKEN and TOM MULVANY

The State of Texas to the Sheriff of Nueces County, Greeting:

Whereas, on the 3rd day of August, A. D. 1945, in the County Court of Nueces County, Texas, in a cause in the nature of a criminal proceeding, and numbered 3626, Con-

way C. Craig, Bob McCracken and Tom Mulvaney, respondents, were adjudged in contempt of Court by reason of having written, published and circulated, and permitted to be written, published and circulated, certain news reports and an editorial intended and calculated to reflect upon the integrity of this Court, to affect the course of justice and the rights of litigants, to coerce and compel a judgment contrary to the law and the evidence, and to block the administration of justice in a cause pending in this Court at the time said publications were made, and the punishment of each of them was assessed at imprisonment in the County Jail of Nueces County for three full days from date hereof. You are therefore commanded to arrest the bodies of the said Conway C. Craig, Bob McCracken, and Tom Mulvany, and place them in the jail of said County, there to remain imprisoned for the said period of three full days from date hereof. Herein fail not, and due return make hereof according to law.

Witness my signature and seal of office, on this the 3rd day of August, A. D. 1945.

Mrs. Henry E. Gouger, Clerk of the County Court of Nueces County, Texas, by (Signed) Claudine Toups, Deputy. (Seal.)

[fols. 328-331] Sheriff's Return of Execution of Capias

Came to hand on the 3rd day of August, A. D. 1945 and executed by arresting the said Conway C. Craig, Bob McCracken, and Tom Mulvany, on the 3rd day of August, A. D. 1945, and placing them in the jail of Nueces County, Texas, where they remained confined until the — day of August, A. D. 1945, the length of time required by the within writ, when they were discharged from further imprisonment.

Returned on this, the — day of August, A. D. 1945.

John B. Harney, Sheriff, Nueces County, Texas, by ——, Deputy.

Sheriff's Return

Came to hand the 3 day of Aug. A. D. 1945 at 12:10 P. M. o'clock *P. M.* executed on the 3rd day of Aug. A. D. 1945, at 12:15 o'clock P. M. by arresting the within named Conway C. Craig, Bob McCracken, and Tom Mulvany at Corpus

Christi, Texas, in Nueces County, Texas, and placing them in the County Jail of Nueces County, Texas.

John B. Harney, Sheriff, Nueces County, Texas, by (Signed) John B. Harney.

Fees: 3.00.

Endorsements as follows: Returned and Filed Aug. 3, 1945. Mrs. Henry E. Gouger, County Clerk, Nueces County, Texas, by (Signed) Claudine Toups, Deputy. Vol. H, pages 437-38.

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[fol. 332] IN THE COUNTY COURT OF NUECES COUNTY, TEXAS, MAY TERM, A. D., 1945

No. 3624

B. M. JACKSON, et al.,

vs.

JOE L. MAYES, et al.

APPEARANCES:

Hon. Joe D. Browning, County Judge, Nueces County, Texas, Presiding.

Messrs. Tarlton & Koch, Nixon Building, Corpus Christi, Texas, by Mr. B. D. Tarlton, for the Plaintiffs.

Mr. Legrand J. Woods, Jones Building, Corpus Christi, Texas, and Messrs. Kemp, Lewright, Dyer, Wilson & Sorrell, Driscoll Building, Corpus Christi, Texas, by Mr. W. M. Lewright, for the Defendants.

Be It Remembered That on the 25th day of May, A. D., 1945, the same being a regular day of the May Term, A. D., 1945, of the County Court of Nueces County, Texas, there came on to be heard before the Honorable Court, and a Jury, the above entitled and numbered cause, whereupon the following testimony, objections, replies, ruling and exceptions were had, to-wit:

[fol. 333] JOE L. MAYES, one of the Defendants, called as a witness by the Plaintiffs under the Adverse Party Rule, first having been duly sworn, testified as follows:

Direct examination.

By Mr. Tarlton:

Q. What is your name, please?
A. Joe L. Mayes.
Q. Where do you live, Mr. Mayes?
A. My home is at Calallen, Texas.
Q. Where?
A. Out near Calallen.
Q. How long have you lived in Nueces County?
A. Nine years.
Q. You are presently in the United States Army?
A. Yes sir.
Q. How old are you, Mr. Mayes?
A. Thirty-five.
Q. And you were inducted into the service about the 17th of January of this year?
A. Yes sir. I left Corpus Christi on the 17th and was inducted on the 19th of January.
Q. Inducted on the 19th of January?
A. Yes sir.
Q. Prior to your departu-e from Corpus Christi what business were you in?
A. I own this business, and I am also in the general insurance business.
Q. You owned what business?
A. Joe L. Mayes Insurance Agnecy, which is an insurance business.
Q. You also own this business in the Elks Club building known as the Playboy?
A. Yes sir.
[fol. 334] Q. That is a beer joint or beer saloon?
A. I didn't understand.
Q. That is a beer saloon, is it not?
A. Yes sir, we handle beer. I don't believe we are allowed to use the word saloon.
Q. What is the nature of the business in the Playboy?
A. We sell beer and some bood.
Q. I believe you state in your answer that you have in there some $45,000.00 worth of equipment?

Mr. Woods: $4,500.00 of equipment.

A. Yes sir.
Q. What is that equipment?

A. Furniture and fixtures, equipment that has been put in for the business.

Q. Who put it in there?

A. Well, I put it in there.

Q. Who owns the mort-ages on it?

A. I don't believe there is a mortgage on it.

Q. It is your property?

A. Yes sir.

Q. Who is associated with you in the business of the Playboy?

A. No one associated with me now. When I went in Mr. Moore was in partnership with me.

Q. No one has any interest in the profits of that business other than you?

A. No sir.

Q. Who runs the business?

A. Mr. Burchard is in charge of it and he has various employees there.

Q. Mr. Burchard doesn't operate the business, isn't in charge of the management?

A. He has a manager there and authority for operation.

Q. Who is that manager?

[fol. 335] A. Mr. Lutts.

Q. Was he employed by you or Mr. Burchard?

A. I employed him.

Q. What is his name?

A. Lutts.

Q. Fred Lutts?

A. Yes sir.

Q. Who else works in that arrangement?

A. Well, Mr. Lutts is manager and he in turn hired his other employees. He has a janitor and various other employees there.

Q. Is Mr. Lutts on a salary?

A. Yes sir, I believe he is.

Q. Well, it is your business. Don't you know?

A. He was on a salary when I left, and unless Mr. Burchard made some other arrangement with him——

Q. What arrangements did you make with Mr. Burchard to continue the business?

A. I left Mr. Burchard in complete charge of it, and he has authority to run it any way he wants to run it.

Q. Does he own an interest in the business?

A. No sir.

Q. Is he compensated out of the profits?
A. He has not been compensated for that so far.
Q. He hasn't?
A. He was kind enough to take over the operation of my business for me.
Q. Be- he is your agent?
A. Yes sir.
Q. And is authorized to act for you in reference to the lease and the operation of that business?
A. Yes sir.
Q. When did you first open that business?
A. About March, 1943, I believe.
[fol. 336] Q. Is that the original lease you made with the owners?
A. Yes sir.
Q. That lease was made between you and the owners and Mr. Moore as co-lessee?
A. Yes sir.
Q. Do you know what its provisions were with reference to rentals?
A. Yes sir, I think so.
Q. What were they?
A. They were to be $225.00 a month for the first year.
Mr. Woods: Speak a little louder.
Q. They were to be $225.00 a month for the first year?
A. Yes sir.
Q. And to be what for the second year?
A. $250.00 for the second year.
Q. And for the third year?
A. $275.00.
Q. This lease you claim right of occupancy under is the third year of your occupancy, is it not?
A. Yes sir.
Q. You knew full well to retain the lease beginning March 14, 1945, that your rental was $275.00 a month?
A. Yes sir. Yes sir.
Q. And you knew that fact from the date of the execution of your original lease, 13th of February, 1943, did you not?
A. Yes sir.
Q. You advised Mr. Burchard when you left here if he desired to renew that lease as your agent he would have to pay $275.00 a month, didn't you?

A. I don't know whether I mentioned the $275.00 to him or not. If I didn't it was an oversight. I did mention to him we expected to stay there another year unless the building was sold.

Q. I am asking you this question: Did you advise him you knew the fact to be in order to remain there after [fol. 337] March 14, 1945, the rate of rental was $275.00 a month?

A. Yes sir.

Q. Did you so advise Mr. Burchard?

A. I don't recall mentioning the $275.00 to him.

Q. That is the answer to my question. You don't remember. That is the answer to the question.

A. Yes, I don't recall.

Q. Then the amount——

A. I don't recall mentioning the amount of $275.00. If I didn't it was an oversight.

Q. Did I ask you whether it was an oversight?

A. No sir, I don't believe you did.

Q. Then answer the question. Did you or not mention it to him?

A. I don't recall mentioning $275.00, but if I didn't it was an oversight.

Q. Answer just my question, will you please?

A. Yes sir.

Q. Your answer is you don't recall whether you did or didn't mention it to him?

A. Yes sir.

Q. That is your answer, and you were fully aware of the fact that after, from February 13, 1945, that your rentals if you stayed there were to increase $25.00 a year?

A. Yes sir.

Q. Before appointing this agent and attorney in fact you discussed with him the management of that property?

A. Yes sir.

Q. You knew for *time*time before you were inducted that you were to be, didn't you?

A. Yes sir.

Q. And notwithstanding you knew you were going away and knew your obligations under that lease if you desired to keep it was to pay $275.00 a month rental on the 14th [fol. 338] you can't say whether or not you advised him of that fact?

A. No sir. I can't say that I mentioned that amount to him. We had quite a lot to discuss there, and I could be mistaken, but I don't recall mentioning the $275.00 to Mr. Burchard.

Q. On the expiration of that lease Mr. Moore withdrew from the business, is that true?

A. No sir, about six months from the time this lease was executed.

The Court: I can't hear you.

Mr. Tarlton: About six months, he said, prior to the expiration of the original lease executed February 13, 1943, Mr. Moore withdrew from the business.

A. I bought his half.

The Court: If I can't hear I am sure the jury can't hear. If you don't mind speak a little louder.

A. Yes sir.

Q. Is it your answer that about six months before the expiration of the original lease that Mr. Moore withdrew from the business?

A. Mr. Moore withdrew from the business about six months after the beginning of the original lease. We had been in business about six months when I bought his half interest in the business.

Q. That would be about six months before the expiration of the lease, wouldn't it?

A. Well, the original lease contained an option for extension each year.

Q. That is the option, but the original lease was for one year?

A. If it was for one year it was about six months before the expiration.

The Court: I would like to know just what Moore was that?

A. O. Moore. His initials, just the letter "O".

Q. Read the lease there.

Mr. Woods: Are you offering the lease?

Mr. Tarlton: Not yet. We will offer it.

Mr. Lewright: Let him go.

[fol. 339] Mr. Woods: Go ahead.

The Court: You want him to read it out loud?

Mr. Tarlton: Yes.

Q. Read the term of it.

The Court: Read it to the jury.

A. Beginning where?

Q. "The State of Texas, County of Nueces. This agreement between Edwin Flato, B. M. Jackson and Harry G. Heaney, hereinafter styled lessor, and O. Moore and J. L. Mayes, hereinafter styled lessee * * *"?

A. Yes sir.

Q. "That the lessor hereby leases unto said lessee that certain portion of the Elks Club Building situated in Corpus Christi, Nueces County, Texas, described as follows: Ground floor only, excluding elevator and entrance thereto, also access to hot water heating plant to be used only as — for the term of 12 months, beginning on the 15th day of March, A. D., 1943, and ending on the 14th day of March, A. D. 1944 * * *"?

A. Yes sir.

Q. That is the term of your lease, is it not, with the other conditions provided for thereunder?

A. Yes sir.

Q. And nothing in that lease about it is a three year term, is there?

A. Yes sir. There is a provision here about renewing this lease.

Q. That is a provision in your favor that if you pay $25.00 per month during the year rental that the new lease may be renewed, isn't that true?

Mr. Lewright: The lease speaks for itself. I have listened to this long enough. The contents of the lease is the best evidence.

The Court: Yes sir, the objection is good.

Q. Your lease provided, doesn't it, for a twelve months term?

[fol. 340] Mr. Lewright: We make the same objection. The lease speaks for itself.

The Court: He can testify as to whether or not the lease speaks for itself or not.

Mr. Lewright: We object——

The Court: I see. The lease is the best evidence?

Mr. Lewright: Yes sir.

The Court: If you want to introduce it——

Mr. Tarlton: Can a witness on cross examination declare the lease is something else other than what it is?

Mr. Woods: The witness didn't so testify, Judge. The witness testified the lease was for one year and had a provision in it for additional years at the end of that time.

Mr. Tarlton: That is what I asked the witness and he testified it was a three year lease. However, to save the argument we will off- it in evidence, and it will speak for itself. It is so offered.

(The same being by the Court Reporter marked, Plaintiff Exhibit No. 1—BEA," and is in words and figures as follows, to-wit:)

[fol. 341] PLAINTIFF EXHIBIT No. 1

Adopted Standard Office Building Lease

THE OF TEXAS,
County of Nueces:

This Agreement, between Edwin Flato, B. M. Jackson, and Harry G. Heaney hereafter styled lessor, and O. Moor- and J. L. Mayes hereinafter styled lessee, Witnesseth:

1. That the lessor hereby leases unto said lessee that certain portion of the Elks Club Building situated in Corpus Christi, Nueces County, Texas, described as follows: Ground floor only, excluding elevator and entrance thereto, also access to hot water heating plant to be used only as——for the term of 12 months, beginning on the 15th day of March A. D., 1943, and ending on the 14 day of March A. D. 1944, or until this lease is terminated in the manner set out, for the agreed rental stipulated and the observance and performance by lessee of the matters and conditions hereinafter specified.

2. Said lessee promises and agrees to pay to the lessor or to his order, as rental for the premises above described and leased, the sum of $2,700.00 at the rate of $2700.00 per annum during the terms of this lease, and any holding over thereafter; said rentals payable in advance on the first day of each month during the terms and continuance of this lease, in monthly installments of $225.00, at the offices of the

lessor in said building, together with interest at the rate of ten per cent (10%) per annum on past due installments until paid, and a reasonable attorney's fee should the claim for such rent be placed in the hands of an attorney for collection after maturity.

3. Said lessee agrees to prevent waste and take good care of the premises described and leased above, and to comply with all the insurance regulations, and not to violate any of the provisions or restrictions of the fire insurance policies now held or which hereafter may be taken [fol. 342] out on said building, so that the lessor will be unable to keep the building insured; and to fully comply with each and all of the requirements of the Rules of lessor, which are printed on the reverse side of this instrument and made a part thereof, as though fully set out herein, and not to use or allow the use of the premises, or any part thereof, for any purpose other than that for which it is rented.

4. Lessee agrees to surrender possession of said leased premises at termination of this lease in as good condition as when received, ordinary wear and tear alone excepted. Any holding over after the termination of this or any renewal of this lease shall be subject to all the other provisions of this lease.

5. In case the building is totally destroyed by fire or other causes, then the lease shall terminate. In case the building is only partially destroyed then the lease shall not terminate in the lessor elects to rebuild, and rent shall abate during such time as the leased premises are not tenantable. Lessor shall have every facility for making the necessary repairs.

6. It as agreed that on the failure of the Lessee to pay any installment of rent when due under the terms of this lease, the lessor shall have the right to terminate or cancel this lease and retake immediate possession of the premises without any notice, and upon such termination or cancellation, the lessee agrees to promptly surrender the leased premises to the lessor.

7. It is agreed that the failure on the part of the lessee to keep and strictly perform any agreement, covenant or condition contained in this lease, or in said rules and made a part hereof shall entitle the lessor to cancel this lease

and retake immediate possession of the leased premises without any notice, and upon such cancellation lessee agrees to peaceable surrender the leased premises to the lessor. Upon the termination of this lease, the lessor shall have the right to eject the lessee or those claiming under him from said premises, and all damages resulting from such termination, ejectments and re-entries are hereby expressly waived.

[fol. 343] 8. The lessee hereby expressly gives the lessor a special lien on all the contents of the leased premises, whether exempt under the law or not, to secure the payment of said rents, due or to become due, which lien is to in no wise impair or affect the lien given by law, but is to be cumulative of the landlord's lien provided by law, and said lien may be enforced against such contents by sale, as is provided by law for sale of personal property under exemption.

9. Rental payments shall be credited on the first rental due.

10. Lessee has option to rent for $250.00 per month, all terms and conditions remaining the same, for one additional year, and $275.00 per month for the second additional year with all terms and conditions remaining the same.

11. In the event of the sale of the building Lessee agrees to surrender his lease at the option of the purchaser, on or after March 14, 1944.

12. Heat, Light, Water and Gas to be paid by Lessor based upon the monthly average of $58.58, all amounts in excess of $58.58 per month is hereby accepted as the amount due each month for Heat, Light, Water, and Gas by Lessee.

Witness our signatures, this 13th day of February, A. D., 1943.

Harry G. Heaney, Edwin Flato, & B. M. Jackson. By B. M. Jackson, Lessor.

O. Moore, Joe L. Mayes, Lessee.

Witness: Marshall Tipton.

(The "Rules of Building" appearing on the reverse of said instrument are not copied for this record.)

[fol. 344] Q. Now, do you find anything in there that says, as you testified, that th-t is a three years lease?

A. No sir, I haven't found that it says it is a three years lease.

Q. All that you have in there, which is at your option, "Lessee has option to rent for $250.00 per month, all terms and conditions remaining the same, for one additional year, and $275.00 per month for the second additional year with all terms and conditions remaining the same." That is true, is it not?

A. Yes sir.

Q. What you had was an option to renew the lease, not an obligation to renew, isn't that correct?

A. Yes sir, I believe so.

Q. Now then at the expiration of the year and on Mr. Moore's withdrawal you entered into a new lease of date the 14th day of March, didn't you, in which you were the sole lessee?

A. Well, it was sometime after Mr. Moore left the business. As I understood this Mr. Jackson merely re-wrote this lease to replace the one we had there with Mr. Moore's signature, and my understanding was the terms and conditions were not to be changed.

Q. Were they?

A. So far as I know they were not. So far, I am sure they were not.

Q. You signed it?

A. Yes sir.

Q. You read it?

A. Yes sir.

Q. And that provided in event you wanted the building for an additional year after its expiration, March 14, 1945, you would pay an additional $25.00 per month?

A. Yes sir.

Q. You understood that?

A. Yes sir.

Q. But you don't know whether you advised Mr. Burchard of your understanding or not?

[fol. 345] A. Well, I wouldn't say that I would know either way. I might have mentioned that sum to him. As I say, there was a lot to discuss in a short time with him, and it is possible I mentioned this additional sum, but I never anticipated any question about it, or never expected there would ever be any question about it. I wouldn't say

positively that I did or didn't mention that particular point to him because I might be wrong either way.

Q. And you as principal knew if you wanted to extend or create a lease under your option for an additional year you would have to pay $275.00 and not $250.00? You knew that?

A. Yes sir.

Mr. Tarlton: I will offer that lease in evidence, Your Honor.

Mr. Woods: We have no objections.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 2—BEA," and being in words and figures as follows, to-wit:)

[fol. 346] PLAINTIFF EXHIBIT NO. 2

Adopted Standard Office Building Lease

THE STATE OF TEXAS
County of Nueces:

This Agreement, between Franklin Flato, Fred Flato, Robert Flato, B. M. Jackson and Harry G. Heaney hereinafter styled lessor, and J. L. Mayes hereinafter styled lessess, Witnesseth:

1. That the lessor hereby leases unto said lessee the certain portion of the Elks Club Building situated in Corpus Christi, Nueces County, Texas, described as follows: Ground floor only, exclusing elevator and entrance thereto, also access to hot water heating plant to be used only as —— for the term of 12 months, beginning on the 15th day of March A. D. 1944, and ending on the 14th day of March A. D. 1945, or until this lease is terminated in the manner set out, for the agreed rental stipulated and the observance and performance by lesse- of the matters and conditions hereinafter specified.

2. Said lessee promises and agrees to pay to the lessor or to his order, as rental for the premises above described, the sum of $3,000.00 at the rate of $3,000.00 per annum during the terms of this lease, and any holding over thereafter; said rentals payable in advance on the first day of each month during the terms and continuance of this lease, in monthly installments of $250.00 at the office of the lessor

in said building, together with interest at the rate of ten per cent (10%) per annum on past due installments until paid, and a reasonable attorney's fee should the claim for such rent be placed in the hands of an attorney for collection after maturity.

3. Said lessee agrees to prevent waste and take good care of the premises described and leased above, and to comply with all the insurance regulations, and not to violate any of the provisions or restrictions of the fire insurance [fol. 347] policies now held or which hereafter may be taken out on said building, so that the lessor will be enabled to keep the building insured; and to fully comply with each and all of the requirements of the Rules of lessor, which are printed on the reverse side of this instrument and made a part thereof, as though set out fully herein, and not to use or allow the use of the premises, or any part thereof, for any purpose other than that for which it is rented.

4. Lessee agrees to surrender possession of said leased premises at termination of this lease in as good condition as when received, ordinary wear and tear alone excepted. Any holding over after the termination of this or any renewal of this lease shall be subject to all the other provisions of this lease.

5. In case the building is totally destroyed by fire or other causes, then the lease shall terminate. In case the building is only partially destroyed then the lease shall not terminate if the lessor elects to rebuild, and rents shall abate during such time as the leased premises are not tenantable. Lessor shall have every facility for making the necessary repairs.

6. It is agreed that on the failure of the Lessee to pay any installment of rent when due under the terms of this lease, the lessor shall have the right to terminate or cancel this lease and retake immediate possession of the premises without any notice, and upon such termination or cancellation, the lessee agrees to promptly surrender the leased premises to the lessor.

7. It is agreed that the failure on the part of lessee to keep and strictly perform any agreement, covenant or condition contained in this lease, or in said rules and made a part hereof shall entitle the lessor to cancel this lease and retake immediate possession of the leased premises without

any notice, and upon such cancellation lessee agrees to peaceably surrender the leased premises to the lessor. Upon the termination of this lease, the lessor shall have the [fol. 348] right to eject the lessee or those claiming under him from said premises, and all damages resulting from such termination, ejectments and re-entries are hereby expressly waived.

8. The lessee hereby expressly gives the lessor a special lien on all the contents of the lease- premises, whether exempt under the law or not, to secure the payment of said rents, due or to become due, which lien is to in no wise impair or affect the lien given by law, but is to be cumulative to the landlord's lien provided by law, and said lien may be enforced against such contents by sale, as if provided by law of personal property under exemption.

9. Rental payments shall be credited to the first rental due.

10. Lessee has option to rent for $273.00 per month, all terms and conditions remaining the same, for one additional year.

11. In the event of the sale of the building Lessee agrees to surrender his lease at the option of the purchaser, on or after March 14, 1944.

12. Heat, Light, Water and Gas to be paid by Lessor based upon the monthly average of $58.58, all amounts in excess of $58.58 per month is hereby accepted as the amount due each month for Heat, Light, Water and Gas, by Lessee.

Witness our signature, this 14th day of March, A. D. 1944.

Joe L. Mayes, Lessee.

Franklin Flato, Fred Flato, Robert Flato, B. M. Jackson, and Harry G. Heaney, by B. M. Jackson, Lessor.

(The "Rules of Building" appearing on the reverse of said instrument are not copied for this record.)

[fol. 349] Q. What did you do with your copy of that lease?

A. The second lease?

Q. Yes.

A. I don't believe I ever received a copy of it, Mr. Tarlton.

Q. Are you positive about that?

A. Mr. Jackson at the time I signed it said he would send down a copy, and when the question came up I couldn't recall having received it, but I never bothered about it particularly. I figured I could go up and get it any time I wanted it.

Q. As a matter of fact, didn't you receive it and lend it back to him in October, 1944?

A. No sir.

Q. You didn't do that?

A. No sir, I don't remember that.

Q. You did known constantly when you signed the lease in order to exercise your option for an additional year you had to pay $275.00 a month?

A. Yes sir. When I signed it I think I understood it all right.

Q. Did you, Mr. Mayes, on the date of the expiration of this lease pay to Mr. Jackson the $275.00?

A. That is this year?

Q. Yes sir.

A. No sir. I wasn't here this year at that time.

Q. You weren't here?

A. No sir.

Q. Did you have anything to do at all in person with an extension or attempted extension of this lease?

A. Well, it was generally understood that Mr. Burchard was looking after those matters.

Q. I'm not asking you that. Did you in person lend any attention to it at all?

A. Well, I didn't have an opportunity to pay any attention to it this year.

[fol. 350] Q. Can you answer my question? Did you or not attend to it or have anything to do with it in person or have your agent attend to it?

A. Well, I expected the agent to, but I didn't have anything to do with it this year.

Q. You didn't have anything to do with it?

A. This year.

Q. Did you maintain a bank account in the State National Bank?

A. Yes sir, when I left here I had an account in the State National Bank that I left in Mr. Burchard's custody.

Q. What was the account? How was it carried?

A. Well, I have had a personal account and a special account in the State National.

Q. You had a J. L. Mayes special account?
A. Yes sir.
Q. Under which Mr. Burchard was authorized to draw?
A. Yes sir.

Mr. Tarlton: I believe that is all, Mr. Mayes.

Cross-examination.

By Mr. Lewright:

Q. Mr. Mayes, during the time of the existence of this first lease, one dated in February, 1943, in favor of yourself and Mr. Moore, which provided for payments to be made on the 14th day of the month, during the previous term of the lease who handled the matter of the payment of those rentals for you and Mr. Moore?
A. I did, I believe.
Q. Sir?
A. I believe I paid the rent each month.
Q. I will ask you to examine this check dated 4-23-'43, and state what that check was for?
A. Well, that is on rent.
Q. For the Playboy?
A. Yes sir.

Mr. Tarlton: Let's see the check, please?

[fol. 351] Q. I will ask you if after delivering that particular check you delivered and additional check for $113.02 on a later date to pay the balance of the rent?
A. Yes sir. That was I had a bill for this. I remember this item, $113.02, to apply on the utlities and balance on the rent.
Q. In other words, on that occasion you hadn't paid your rent in full?
A. No sir.
Q. Did you get a bill from Mr. Jackson for it?
A. Yes sir.
Q. I will ask you if that is the bill?
A. Yes sir.
Q. Then these two checks, the first check here is covering a portion of the rental from April 15 to May 05, and the remaining check was to cover the balance of that time and May 15 to June 15?

The Court: What year?
Mr. Lewright: 1943.
A. That is not quite correct the way I understood.

Q. Just what are the facts?

A. The first check in the amount of $125.00 was to apply on the rent.

Q. Yes.

A. Later I had a statement from Mr. Jackson, or his office, itemizing some utility bills and the rent that was due, showing a balance of $100.00 on the rent and $13.02 on other items, and I issued a check for $113.02 and mailed it to cover this statement.

Q. And that was for the back rent?

A. Yes sir.

Mr. Lewright: I ask to have these identified and offer them in evidence.

(The same being by the Court Reporter marked, "Defendant Exhibits Nos. 3, 4, and 5—BEA," respectively, and being in words and figures as follows, to-wit:)

[fol. 352] DEFENDANT EXHIBIT No. 3

Corpus Christi, Texas, May 26, 1943.

M. O. Moore and J. L. Mayes, % Mayes Ins. Agcy., Palace Theater Bldg., Corpus Christi, Texas.

In Account with F. & J. Ltd.

| | | |
|---|---|---|
| To Rent April 15-May 15, 1943 | | 225.00 |
| By check on account | | 125.00 |
| | | 100.00 |
| To rent May 15-June 15, 1943 | | 225.00 |
| | | 325.00 |
| By check | | 225.00 |
| | | 100.00 |
| Lights 3/22 to 4/22/43 | 42.52 | |
| Water, 3/17-4/18/43 | 10.95 | |
| Gas, 3/17-4/18/43 | 18.13 | |
| | 71.60 | |
| Less amt. to be paid by us | 58.58 | |
| | | 13.02 |
| | | 113.02 |

DEFENDANT EXHIBIT No. 4

Corpus Christi, Texas, 4-23-1943. No. —.

Corpus Christi Bank and Trust Company 88-128

Pay to the order of B. M. Jackson—$125.00—One Hundred Twenty five and No/100—Dollars.

Playboy Amusement Co., J. L. Mayes.

Apply on rent a/c 701 N. Water.

O. Moore.

Endorsements: B. M. Jackson for deposit F. & J. Ltd. By B. M. Jackson.

[fol. 353] (And:)

Stamp endorsement of Corpus Christi National Bank showing deposit on May 13, 1943, and perforation endorsement showing payment by Corpus Christi Bank and Trust Company on May 14, '43.

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DEFENDANT EXHIBIT No. 5

Corpus Christi, Texas, 6-21-43 194 No. 59

Corpus Christi Bank and Trust Company 88-128

Pay to the Order of B. M. Jackson $113.02—One Hundred Thirteen and 02/100—Dollars.

Playboy Amusement Co., J. L. Mayes.

Endorsements: For deposit only to the acct. of F. & J. Ltd., By B. M. Jackson. B. M. Jackson.

(And:) Stamp endorsement of Corpus Christi National Bank showing deposit July 2, 1943, and perforation endorsement of payee bank showing payment July 3, 1943.

[fol. 354] Q. All right. Now, your check No. 109, issued to B. M. Jackson, for $225.00, is that——

Mr. Tarlton: We object to the introduction of those check- for the reason they are immaterial and irrelevant to any issue in this case, and they were paid as rent on a separate and distinct lease, a lease between other parties than the defendant here and plaintiff here.

Mr. Lewright: We offer the exhibits under the pleadings to show established custom.

The Court: For what year?

Mr. Lewright: 1943.

Mr. Tarlton: The '43 lease was entirely different from the one involved.

The Court: When was the last lease?

Mr. Lewright: It was dated on the 14th day of March, 1944.

Mr. Tarlton: In all those other——

The Court: Objection sustained.

Mr. Lewright: Your Honor sustains the objection?

The Court: Yes sir.

Q. I will ask you whether or not under any former lease Mr. Jackson customarily permitted you to pay rent anywhere from two days to a week late?

Mr. Tarlton: That is the same question and same objection. We have no former lease.

Mr. Woods: We have pleaded custom. The former lease is identical to the present lease. The option was for an additional two years. Throughout the entire transaction, we allege in our pleadings, from the original lease down to date it has been the custom and they have accepted checks one and two days and a week late.

The Court: The lease holds good from 1944, whenever it was signed. It is the opinion of this Court that any practice after 1944, or whenever that lease was signed, is [fol. 355] admissible, but anything that happened back of that is not admissible.

Mr. Lewright: We bow to Your Honor's ruling.

Q. I hand you check, dated May 18, 1944, check No. 160, payable to B. M. Jackson, and ask you what that check represents?

Mr. Tarlton: We object to that, Your Honor, on the grounds it is immaterial and irrelevant because as a matter of law the lease cannot be extended by proof of payment of delay rental prior to the expiration. Consistent with the Court's ruling I wish to state it now and say at the proper time we can offer our argument, which is fatal to their position.

Mr. Lewright: New lease dated March 18, 1944.

Mr. Tarlton: Within the terms of the Court's ruling that testimony is admissible, but we desire to call attention to the fact that at the proper time we will present authorities in support of our position that the defense is not obtainable.

Mr. Lewright: We will present our defense.

The Court: I am of the opinion that this testimony could be admitted at this time if you show where——

Mr. Tarlton: That goes to the——

Q. What does that check represent?

A. That was for rent.

Q. For what month?

A. Well, from the date I would think it would be from May——

Mr. Tarlton: We object to him testifying from an opinion.

Q. Do you know?

The Court: You will have to be definite about it. You can't think.

Q. Do you know what month it was?

A. It appears to be from May 15, 1944, to June 15, 1944.

Mr. Tarlton: We object and move to strike the answer. The check speaks for itself.

[fol. 356] The Court: The jury will disregard the answer.

Mr. Lewright: To which we except.

The Court: And not take it into consideration.

Q. You don't know?

The Court: The objection is sustained.

Mr. Lewright: All right.

Q. You don't know of your own knowledge?

A. Well, yes. I would be safe in saying that was from May 15 to June 15, because it is dated May 18.

Mr. Tarlton: That is another opinion. He says, "I am safe in saying," because of the date. He can say, "Yes" or "No"; it is for this or that.

The Court: I am of the opinion you are right, Mr. Tarlton. You will have to testify, and Gentlemen of the Jury, disregard the answer unless the witness can absolutely testify it is May, or——

Mr. Lewright: You Honor sustained the objection.

The Court: It is sustained and the jury will disregard the answer.

Q. Can you answer "Yes" or "No," whether or not that check represents the payment for that month?

A. Yes sir.

Q. What?

A. Yes sir, it does.

Q. It does represent it. That shows the date is May 18, four days later than the 14th?

A. Yes sir.

Mr. Lewright: Identify it, and we offer it in evidence.

(The same being by the Court Reporter marked, "Defendant Exhibit No. 6—BEA," and being in words and figures as follows, to-wit:)

[fol. 357] DEFENDANT EXHIBIT No. 6

Corpus Christi, Texas, 5-18-1944. No. 160

Corpus Christi Bank and Trust Company 88-128

Pay to the Order of B. M. Jackson $250.00—Two Hundred fifty and No/100—Dollars.

Playboy Amusement Co., J. L. Mayes.

Endorsements: B. M. Jackson. For Deposit Only F. & J. Ltd., By: B. M. Jackson.

(And:)

Stamp endorsement of the Corpus Christi National Bank showing deposit on May 26, 1944.

(And:)

Perforation endorsement of Payee bank showing payment (The perforations on this check not being complete it is impossible to determine by the performation the date of payment by the Payee bank.)

[fol. 358] Q. I hand you check 170, dated June 16, 1944, payable to B. M. Jackson, for $250.00.

A. That is for a month's rent.

Q. For what month?

A. June 15 to July 15.

Q. June 14 or 15?

A. June 15.

Q. The contract provides for rental——

Mr. Tarlton: We object to him leading his witness.

Q. Under the provision of the lease——

Mr. Lewright: Wait a minute, Mr. Tarlton. Let me state my question.

Mr. Tarlton: I beg your pardon.

Q. Does the lease provide for rentals to be payable the 14th of March, "• • • said rentals payable in advance on the first day of each month during the term and continuance of this lease, in monthly installments of $250.00."

A. Now, the lease is dated the 15th, but my recollection was that the rent date was the 15th of the month.

Q. But on the first of each month, then as I understand it when Mr. Burchard here on the 21st day of March, walked into Ben Vaughn's office, if he did, and offered to pay $275.00, he was ahead of the first day of the month?

Mr. Tarlton: We object to that. He may have been ahead. He may have been behind.

Mr. Lewright: All right.

The Court: Let the witness testify, Mr. Lewright.

Mr. Lewright: All right.

Q. Now, the check you have just identified, these two checks, 160 and 170, you have in your hand, were they cashed?

A. Yes sir. Yes sir, they were cashed.

Q. Mr. Jackson accepted them?

A. Yes sir.

Q. All right, I hand you check No. 171, dated June 16, [fol. 359] 1944, for $32.72, and ask you what it covers?

A. Well, this check was for utility bill. It is covered under this provision down here.

Q. I see. When were they payable under the terms of the lease?

A. Well, I paid them whenever Mr. Jackson would get his utility bills and then mailed me the amount I owed later and I would send him check. I don't remember any particular date involved.

Q. All right. I hand you check 187, dated July 15, 1944, and ask you what that check represents?

A. That is for rent from July 15 to August 15.

Q. If the rental was payable on the 14th every one of these checks are dated from one day up to four days later?

A. Yes sir.

Q. They were all accepted by Mr. Jackson and cashed by him?

A. Yes sir.

Q. I hand you check 195, dated 8-16-'44, and ask you what that represents?

A. That was for rent from August 15 to September 15, 1944.

Q. Was that check accepted and cashed?

A. Yes sir.

Q. I hand you check dated 9-16-'44, check 209, and ask you what that check represents?

A. That was rent from September 15 to October 15, 1944.

Q. I hand you here—Was that check accepted and cashed by Mr. Jackson?

A. Yes sir.

Q. I hand you check dated October 21, 1944, and ask you what that check represents?

A. That is rent from October 15 to November 15, '44.

Q. Was that check accepted and cashed by Mr. Jackson?

A. Yes sir.

Mr. Lewright: Identify those and we offer them in evidence.

(The same being by the Court Reporter marked, "Defendant Exhibits Nos. 8 to 13—BEA," respectively, and same being in words and figures as follows, to-wit:)

[fol. 360] DEFENDANT EXHIBIT No. 8

Corpus Christi, Texas, 6-16-1944 No. 170

Corpus Christi Bank and Trust Company 88-128

Pay to the Order of B. M. Jackson $250.00—Two Hundred Fifty and No/100—Dollars.

Playboy Amusement Co., J. L. Mayes.

Endorsements: B. M. Jackson for Deposit to F. & J. Ltd.
(And:) Stamp endorsement of Corpus Christi National Bank showing deposit on July 5, 1944.
(And:) Perfortion endorsement by Payee bank insufficient to show date of payment.

DEFENDANT EXHIBIT No. 9

Corpus Christi, Texas, 6-16-44 194- No. 171

Corpus Christi Bank and Trust Company 88-128

Pay to the Order of B. M. Jackson $32.72—Thirty-two and 72/100—Dollars.

Playboy Amusement Co., J. L. Mayes.

Endorsements: B. M. Jackson for Deposit to F. & J. Ltd.
(And:) Stamp endorsement of Corpus Christi National Bank showing deposit July 5, 1944.
(And:) (Perforation endorsement of Payee bank insufficient to show date of payment.)

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[fol. 361] DEFENDANT EXHIBIT No. 10

Corpus Christi, Texas, 7-15-1944 No. 187

Corpus Christi Bank and Trust Company 88-128

Pay to the Order of B. M. Jackson $250.00—Two hundred fifty and No/100—Dollars.

Playboy Amusement Co., J. L. Mayes.

Endorsements: B. M. Jackson for Deposit Only to the Acct. of F. & J. Ltd.
(And:) Stamp endorsement of Corpus Christi National Bank showing deposit July 24, 1944.
(And:) Perforation endorsement of Payee bank showing payment July 25, 1944.

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DEFENDANT EXHIBIT No. 11

Corpus Christi, Texas, 8-16-1944 No. 195

Corpus Christi Bank and Trust Company 88-128

Pay to the Order of B. M. Jackson $250.00—Two hundred fifth and No/100—Dollars.

Playboy Amuseemnt Co., J. L. Mayes

Endorsements: B. M. Jackson by Moore for deposit only E. & J. Ltd.
(And:) Stamp endorsement of Corpus Christi National Bank showing deposit Sept. 15, 1944.
(And:) Perforation endorsement of payee bank showing payment Sept. 16, 1944.

[fol. 362] DEFENDANT EXHIBIT No. 12

Corpus Christi, Texas, 9-16-1944 No. 209

Corpus Christi Bank and Trust Company 88-128

Pay to the Order of B. M. Jackson $250.00—Two hundred fifth and No/100—Dollars.

Playboy Amusement Co., J. L. Mayes.

Endorsements: B. M. Jackson for deposit only to F. & J. Ltd., by B. J. Moore.

(And:) Stamp endorsement showing deposit with the Corpus Christi National Bank Sept. 23, 1944.

(And:) Perforation endorsement of Payee bank showing payment Sept. 25, 1944.

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DEFENDANT EXHIBIT No. 13

Corpus Christi, Texas, 10-21 1944 No. 218

Corpus Christi Bank and Trust Company 88-128

Pay to the Order of B. M. Jackson—$250.00—Two hundred fifty and No/100—Dollars.

Playboy Amusement Co., J. L. Mayes.

Endorsements: B. M. Jackson for deposit only to Acct. of F. & J. Ltd. B. J. Moore.

(And:) Stamp endorsement of Corpus Christi National Bank showing deposit Oct. 30, 1944.

(And:) Stamp endorsement of Payee bank showing payment October 31, 1944.

[fol. 363] Q. These checks for January and February rentals I have here, you know nothing about them except from hearsay?

A. That is right.

Q. Mr. Mayes, I will ask you whether or not——

The Court: Just a minute. Repeat that.

(Previous question and answer read by the Court Reporter.)

Q. I will ask you whether or not during the month of October, 1944, last year, you had a conversation with Mr.

Jackson with reference to possible sale and long term lease on the building?

A. Yes sir.

Q. Where was that conversation?

A. Up in Mr. Jackson's room in the old Elks Building.

Q. What was the substance of that? State briefly the substance of that conversation.

A. The substance of that was that Mr. Jackson was on a deal or was planning to negotiate with some people who were interested in taking a long term lease, either on the lot adjoining the building, or part of the building, or on the entire ground floor of the building.

Q. Who were those people as he stated?

A. K. Wolens.

Q. Those people in the store on the corner down there?

A. Yes sir.

Q. All right.

A. And as I recall it Mr. Jackson told me at that time he didn't expect to sell the building; he expected to keep it, and he was, I thought, very considerate and very fair about calling me in before he negotiated with them, and he told me he wanted to be prepared to talk to them on three different propositions within a short time, and he wanted to see that I was properly taken care of, and asked me what I would be willing to take and allow these people a part of the building and retain part of it, and also if I would let them have all of it, and the other proposition, I believe, only affected a piece [fol. 364] of vacant ground, and one proposition we discussed there was leaving an alley into the rear of the building, and during the visit I mentioned to Mr. Jackson that before I spent any considerable amount, any big amount that I had in mind at that time, we had figured on something like $4,000.00, there I mentioned to him at the time before I spent any considerable money I would want a long term lease, and my impression was he was favorable to giving me a long lease.

Mr. Tarlton: We object to his impression.

The Court: Disregard his impression, and strike it from the record.

Q. What did——

The Court: Objection sustained.

Q. What did Mr. Jackson say?

A. He said he would like to have an idea about what I would be satisfied with there before he talked to them. I told him that——

Q. All right.

A. —Mr. Burchard kept all of the books on the business, and could tell us better than I could tell him what the business was doing, and what we could expect to make within the next year or within the next five years, and I suggested that I have Mr. Burchard or get Mr. Burchard to come down and talk it over with him, and for both of them to advise me, and we made an appointment then for Mr. Burchard to see Mr. Jackson, and they met at a later date, within two or three days, and discussed the figures and I told Mr. Jackson I was willing to take his and Mr. Burchard's advice in the matter.

Q. All right.

A. That I didn't expect to spend much money for the coming year and then *then* if I spent several thousand dollars there I didn't want a short lease. My recollection is that Mr. Jackson said we would proceed in that deal as though we had executed a five years lease.

[fol. 365] Q. Subsequent to that conversation, in December what conversation did you have about the K. Wolens deal?

A. That it had fallen through.

Q. What discussion did you have with reference to what improvements you would make?

A. I mentioned I didn't want to spend too much money without a long lease. We would go ahead and spend whatever was necessary for another year.

Q. All right.

A. But I had no idea that there was any question about the lease.

Q. What, if anything, did he say relative to whether he would or would not give you a long term lease?

Mr. Tarlton: We object to the question as leading.

The Court: What was the question?

Mr. Tarlton: Read the question.

(Question was read by the Court Reporter.)

Mr. Lewright: What, if anything, did he say?

Mr. Tarlton: He is putting in the witness' mouth the sub-

ject he wants him to answer about it, and the objection we made is that it is leading.

The Court: The objection is sustained. The question is leading.

Mr. Lewright: Your Honor rules it is leading, and we bow to Your Honor's ruling.

Q. Mr. Mayes, what other conversation, if any, did you have there with him then relative to the matter?

A. We had quite a long conversation and I just covered it briefly as to what he had in mind; we prepared some diagrams of the building and one thing and another.

Q. This is the December conversation I am talking about, after he told you that the K. Wolens deal had fallen through, what, if any, conversation occurred between you with reference to the lease?

[fol. 366] A. About the only other conversation I believe we had was Mr. Jackson mentioned that the building might be sold, or something to that effect, and I asked him if it had been sold, if it had been transferred, and he said, "No, it wouldn't be until after the first of the year if it was sold."

The Court: What year is this?

Mr. Lewright: December, 1944.

The Court: Wait a minute. Let him testify.

A. That is right.

Q. All right.

A. Last December.

Q. What, if anything, was said relative to your lease and the option?

Mr. Tarlton: We object to him leading the witness. He is going back to the same tactics.

Mr. Woods: That is not leading. He asked him if anything was said about it.

The Court: That is overruled.

Mr. Lewright: Go ahead and answer the question.

A. Well, I went so far as to state I had another year if the building wasn't sold, and that is the general understanding.

Mr. Tarlton: We object to general understanding.

Q. What did he say and what did you say?

A. I said if the building wasn't sold I had another year.

Q. All right.

A. And that is all.

Q. Did he say anything?

A. No sir. Mr. Jackson never mentioned to me that he expected to make any change.

Q. What, if anything, was said then relative to you doing any work in the building in your December conversation, renovating the building?

A. I don't believe we discussed that other than I just mentioned I was painting or cleaning up or something to that effect.

Q. Painting and cleaning up?

[fol. 367] A. Yes sir, but I had never gone into those things with Mr. Jackson. I had never sent him a bill for painting or repairs. I never had any particular reason to discuss it with him.

Q. Did you or not in that conversation inform him you were going to keep the building for another year?

Mr. Tarlton: We object to that as plainly leading.

Mr. Lewright: He can answer that he did or didn't.

Mr. Tarlton: Oh, yes, but he is putting the words in the witness' mouth that he wants him to answer.

The Court: Read the question.

(Question was read by the Court Reporter.)

The Court: Objection sustained.

Mr. Lewright: Note the exception.

Q. What, if anything, additional was said there between you?

A. Well, that is all.

Q. All right. Now, after that conversation what, if anything, did you do relative to renovating the building?

A. Well, I closed the business for a week and painted and did some repair and improving.

Q. When was this?

A. That was the week after Christmas.

Q. Well after Christmas of what year?

A. 1944.

Q. 1944?

A. Last December.

Q. Now, at that time would you have done that renovating work in the event you determined Mr. Jackson wasn't going to permit you to have the building for the next year?

A. No sir.

Q. How much money did you actually expend or what was the cost of the renovating work in December, '44, on the building?

A. I would say about $400.00. I don't remember the exact cost.

Q. Will that be within a few dollars of it?

[fol. 368] A. Not less than $400.00.

Q. Not less than $400.00. All right, now, I believe you say in January your were inducted into the Army?

A. Yes sir.

Q. When was the first time you had knowledge Mr. Jackson was trying to take the building away from you?

A. Well, I was served with a citation to appear in court.

Q. Where were you then?

A. At Camp Hood.

Q. Doing what?

A. In the Army.

Q. I see. Were you able to be here at the trial of the Justice Court case?

A. No sir.

Q. How did you get down here this time, or what kind of leave do you have now?

A. I got special permission to come on a four day furlough.

Q. Do you know whether or not we got that permission for you through Capt. Dineed?

A. That was my information on it.

The Court: Captain who?

Mr. Lewright: Capt. Dineen in the Adjutant General's Department.

A. Yes sir.

Q. Mr Mayes, is Mr. Burchard entirely familiar with your books, has he maintained them and kept them during the last year?

A. Yes sir.

Q. Did he keep them during the year 1944?

A. Yes sir.

Q. Are you now familiar with the figures or actual profits in 1944?

A. Well, I know roughly, but as to the details Mr. Burchard done all of that detail work, but I naturally know

about what is made. Now, I wouldn't want to give in dollars and cents the exact figures.

[fol. 369] Q. Is he in a position to give those figures?

A. Yes sir.

Q. I see. Do you know approximately what your net was out of that business, over and above expenses and depreciation?

A. Yes sir.

Q. What was it?

A. Yes sir, I think around $7,500.00.

Q. What property have you in the building?

A. I have quite a lot of equipment there that is necessary to that kind of business.

Q. Well, what is some of it?

A. Furniture and freezing equipment, cooling equipment.

Q. In your best judgment what did your freezing and cooling equipment cost you to be installed?

A. I don't recall just how to divide the cooling part of it, but I do remember in the original installation, I know of $3,000.00 plus considerable other money I spent at the time, then about a year later I spent quite a little money for equipment, but Mr. Burchard could his figures would be more reliable than my memory as to the exact cost of it.

Q. In your best judgment, if you have to *jnk* that stuff and sell it on the open market what could you get for it?

A. It would not be worth much.

Q. What do you mean by much?

A. Well, I guess, I would guess $1,000.00.

Q. Now, do you know of any other building or any other location in Co[illegible]us Christi, Texas, that if you are put out of this building that you could obtain now to put your property back into and start up a business again?

A. No sir.

Q. Do you know of any *any* where within a radius of ten or twelve blocks of your present location?

A. No sir.

Mr. Lewright: That is all.

[fol. 370] Re-direct examination.

By Mr. Tarlton:

Q. Have you made any effort to locate any other business?

A. No sir. I haven't had an opportunity since I learned of this.

Q. Now, in that business you say you have $4,500.00 worth of equipment, is that what you say approximately?

A. Approximately, yes sir.

Q. You say you couldn't sell that at a used value in excess of $1,000.00?

A. I don't think so.

Q. Have you made any effort to sell it?

A. No sir.

Q. Have you taken any prices or bids on it?

A. No sir. I haven't had time. I haven't had an opportun[illegible]y.

Q. Haven't had your bookkeeper or agent in fact, Mr. Burchard?

A. He may have.

Q. Do you have a refrigerator?

A. How is that?

Q. You have a refrigerator there?

A. We don't have what you would call a refrigerator. We have refrigerators for the cooling of the beer.

Q. How do you cool the beer usually?

A. Mostly ice.

Q. Have an ice box for it?

A. Yes sir, have several ice boxes.

Q. That is all removable, is it not?

A. Yes sir; it can all be moved.

Q. It isn't built in?

A. Well, some of the equipment is built in.

Q. You have, the refrigerator where you cool beer is in a box, is it not?

A. Yes sir.

Q. You have coils, you serve keg beer?

A. No sir, we don't serve keg beer.

[fol. 371] Do you have tables and other fixtures?

A. Yes sir.

Q. All of those are removable, are they not?

A. Well, that part I had built in there, I don't know whether it would stand moving very well or not.

Q. Now, when you closed for renovation was when there was a beer shortage, wasn't it?

A. Well, there has been a beer, some beer shortage for a good long while, but during the winter months beer would be more plentiful.

Q. Was there a beer shortage at the time you closed for renovation?

A. Not at that place, Judge.

Q. There wasn't at that time in December, 1944?

A. No sir.

Q. You spent on the prospect of renewing your lease some $400.00?

A. Yes sir.

Q. All of the rest of the money or investment you have there was spent with the knowledge in front of you that in the event of sale your lease would terminate on the 14th of March, 1944?

A. Yes sir.

Q. You knew when you made those improvements that you say were worth $4,500.00 your lease was subject to termination in event of sale?

Mr. Lewright: We object to that as immaterial and irrelevant; no allegation of sale, no contention they have a right to obtain this because of sale. The sole issue is whether or not the lease terminated. So it is immaterial and irrelevant about any sale.

Mr. Tarlton: He is claiming estoppel on the basis of improvements made, and I want to show that those improvements would have been made whether the lease expired or not.

The Court: Objection overruled.

Mr. Lewright: Note our exception.

Q. You say you didn't know anything about the plaintiffs' [fol. 372] contention that this lease had terminated until you were served with notice of this suit?

A. Yes sir.

Q. You weren't informed by Mr. Burchard that he hadn't paid the rental of $275.00 a month?

A. No sir.

Q. You were not informed that he had received notice about the 19th of March advising him that the lease was terminated?

A. No sir.

Q. You were not advised that he had been returned a check he had post dated from the 25th of March to the 25th of April for $250.00?

A. No sir.

Q. Or $275.00. Mr. Burchard didn't advise with you at all with reference to this matter——

A. I had left Mr. Burchard——

Q. —Until after you had been served with citation in this case?

A. Yes sir.

Q. Which was after the 20th of April, isn't that true?

A. Yes sir.

Q. I hand you here—First, was this letter ever received by you?

A. No sir.

Q. Mr. Burchard was your agent and duly authorized by you to act in those premises for you, wasn't he?

A. Yes sir.

Mr. Tarlton: I will offer this letter in evidence.

Mr. Lewright: Not until it is proved up. We object until it is proven. The Witness says he doesn't know anything about it.

Mr. Tarlton: I believe that is all, Mr. Mayes.

Mr. Lewright: That is all.

The Court: Are both sides through with Mr. Mayes?

Mr. Lewright: Sir?

[fol. 373] The Court: Both sides through with Mr. Mayes?

Mr. Lewright: We are at this time.

The Court: Stand aside, Mr. Mayes. You will have to be at the call of the Court.

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[fol. 374] F. F. Burchard, One of the Defendants, called as a witness by the Plaintiffs, first having been duly sworn, testified as follows:

Direct examination.

By Mr. Tarlton:

Q. Mr. Burchard, you received this letter from Mr. Vaughn, didn't you?

A. Yes sir.

Mr. Tarlton: We offer the same letter in evidence.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 14—BEA," and same being in words and figures as follows, to-wit:)

[fol. 375] PLAINTIFF EXHIBIT No. 14

Corpus Christi, Texas, March 19, 1945.

Mr. J. L. Mayes, Palace Theatre Building, Corpus Christi, Texas.

Attention: Mr. F. F. Burchard

DEAR SIR:

You have heretofore been occupying the ground floor of a building known as the Elks Club Building under the terms of a lease executed on the 14th day of March, 1944 between Franklin Flato, et al. and yourself which lease was for a term of one year beginning the 15th day of March, 1944 and ending the 14th day of March, 1945.

This lease having expired on March 14, 1945, I have been instructed to request that you kindly give possession of this space immediately.

I enclose herewith check No. 1237 dated March 14, 1945, payable to B. M. Jackson in the amount of $250.00 which was received by him on March 15, 1945.

Yours very truly, Ben Vaughn, Jr., Ben F. Vaughn, Jr.

BFV:mg. Encl.

[fol. 376] Q. After you received this letter did you ever notify Mr. Mayes that you, that the landlord claimed the termination of his option and lease of the building?

A. Not at that time, no sir.

Q. When did you first notify him?

A. First time conversation I had with him was subsequent to the time they served him with papers in this case.

Q. Subsequent to the time they serve him?

A. Yes sir.

Q. That was the first conversation?

A. Yes sir.

Q. Had you advised him by letter or otherwise?

A. No sir.

Q. That instead of mailing the $275.00 as called for in the lease you had mailed $250.00?

A. Not until after he was served with the papers in the case.

Q. Is this the check you sent to Mr. Jackson?

A. Yes sir.

Q. You never at any time notified Mr. Jackson that as agent for Mr. Mayes you were exercising the option under the lease to renew the lease?

A. Yes, I had.

Q. When did you do that?

A. In December, 1944.

Q. How did you notify him, in writing?

A. No sir.

Q. What did you tell him?

A. I told him we intended to exercise our option under that lease.

Q. Did you have any option under the lease?

A. Yes sir.

Q. You did?

A. We did. That means we have it. I am attorney for Mr. Mayes; I am attorney in fact.

[fol. 377] Q. When you say "we" who are the parties other than Mr. Mayes interested in the matter?

A. Nobody.

Q. What did you mean when you said "we"?

A. I mean editorially "we." I was acting for Mr. Mayes.

Q. Who was exercising——

A. At that time I was acting as Mr. Mayes' attorney in fact under registered power of attorney in the Clerk's office.

Q. Do you have that?

A. I do. It is recorded.

Q. Do you have the original.

A. I have it in my office.

Q. Will you bring it in the morning?

A. I will be glad to.

Q. O-kay. You issued a check for $250.00 and with your inclosure you didn't state anything to Mr. Jackson in writing as to whether you were exercising your option or not, did you?

A. I just sent him the check, Mr. Tarlton.

Q. And the amount you made it for was the old amount under the old lease, and not the $275.00 required in the option?

A. That is correct.

Q. How did you expect him to be advised you were exercising an option claimed under the old lease?

A. I had personally told him we were going to exercise our option.

Q. When did you tell him that?

A. In December, 1944.

Q. Where did you tell him?

A. In the office of the Playboy at 701 North Water Street.

Q. Who was present when you told him that?

A. I don't recall that there was anybody present, although may have been.

Q. Where was Mr. Mayes at that time?

A. I don't know.

[fol. 378] Q. He wasn't then in the United States Army?

A. Not in December.

Q. He was attending to his own business and managing that property at that time?

A. Well, I was handling it mostly at that time.

Q. Did you advise Mr. Jackson that "we are going to renew the lease," or Mr. Mayes is going to renew?

A. Advised him Mr. Mayes was going to renew it.

Q. Is that what you said?

A. Yes sir.

Q. Did you exhibit to him your power of attorney to act for Mr. Mayes?

A. I didn't.

Q. Did you advise him you had such power of attorney at that time?

A. Yes sir; that was talked.

Q. Did you?

A. Yes sir.

Q. In that conversation?

A. Yes sir.

Q. What did you tell him in that regard?

A. I told him Mr. Mayes had asked me to handle this matter with him, that I was representing Mr. Mayes under power of attorney.

Q. Upon receipt of this letter from Mr. Vaughn I just showed you did you hand to Mr. Jackson another check?

A. Yes sir, as soon as, soon after that.

Q. You post dated that check, didn't you?

A. Yes. I made an error in writing it.

Q. You wrote the date April 21, 1945, rent for Playboy, dated April 14, didn't you?

A. Yes sir.

Q. And mailed the check to him on March 21?

A. I wrote on the check what it was for, "Rent Playboy, April 14, 1945."

Q. You didn't give him a check, but gave him a post dated check, April 21?

[fol. 379] A. I inadvertently used the word "April" when it should have been in fact March.

Q. When it should have been March and you wrote April, and a post dated check is what you gave him?

A. The check was perfectly good and would have been paid on presentation.

Q. How do you know that?

A. Because I made inquiry at the bank.

Q. Checks are paid when post dated?

A. Yes sir, that one would have been.

Mr. Woods: We object to the argument. The check speaks for itself.

Q. But you made the mistake and post dated it 30 days from the date you intended?

A. Yes sir. I made a mistake and I am sorry for it.

Mr. Lewright: It doesn't make any difference.

Q. That check was returned to you by registered mail, I believe, and you didn't take it out of the post office, isn't that correct?

A. It was never returned to me. They say they sent it back. I never received it.

Q. You received notice of the registered letter, didn't you?

A. Yes sir.

Q. Why didn't you get it?

A. I didn't have time to go up and get it. I didn't take time.

Mr. Tarlton: I believe this letter is acknowledged by the defendants. I want to offer it in evidence.

(Same being by the Court Reporter marked, "Plaintiff Exhibit No. 15—BEA," and being as follows:)

[fol. 380] PLAINTIFF EXHIBIT No. 15

Corpus Christi, Texas,
April 13, 1945.

Mr. F. F. Burchard, Palace Theatre Building, Corpus Christi, Texas.

DEAR SIR:

Enclosed herewith I return to you the post-dated check that you mailed to Mr. B. M. Jackson. The owner's position is that the lease terminated and that the parties in possession are occupying it as trespassers.

Please be advised, if the property is not surrendered peacefully that you will be called upon to produce this check at the trial for the recovery of the possession or secondary evidence of its contents will be offered.

Yours very truly, B. D. Tarlton.

BDT:hb.

[fol. 381] Mr. Tarlton: We offer the check and the letter.

(The check being by the Court Reporter marked, "Plaintiff Exhibit No. 16—BEA," and is in words and figures as follows, to-wit:)

[fol. 382] PLAINTIFF EXHIBIT No. 16

Corpus Christi, Texas, 3-14-1945 No. 1237

Pay to the Order of B. M. Jackson $250.00—Two Hundred Fifty & No/100—Dollars.

J. L. Mayes Special, F. F. Burchard.

To State National Bank of Corpus Christi, Texas, 88-126, Corpus Christi, Texas.

(And no endorsements appearing on the reverse thereof.)

[fol. 383] Q. I will ask you, Mr. Burchard, did you receive a letter of which this is a carbon copy?

A. I can't say that I received that letter.

Q. Will you look and see if you can find such a letter in your file?

A. Yes sir.

Q. Please do that.

Mr. Woods: I think that is the letter in the Justice Court that we didn't have the original of. I don't think we have it.

Mr. Tarlton: He has had notice to produce it. I offer the letter as secondary evidence.

Mr. Lewright: No proof it was ever sent. We object until it is proven it was sent. Who signed it?

Mr. Tarlton: Signed by Mr. Jackson. I thought he admitted receiving it on the trial below. I don't know.

Mr. Woods: No sir. We don't admit receiving it.

Mr. Tarlton: We demand the production of this letter, and ask counsel——

Mr. Lewright: We will just tell him now we don't have it.

Mr. Tarlton: We ask a search be made for it.

Mr. Lewright: We will tell you without making a search it has been made and we don't have the original letter. Mr. Jackson can identify it if he sent it.

Mr. Tarlton: I can prove it by Mr. Jackson.

Q. Didn't you prove in the trial of this case in the Justice Court that you received a letter of which this is a copy?

A. No, I didn't so testify.

Q. Did you receive a letter addressed to you by Mr. Bush Jackson of date April 3, 1945?

A. No, I didn't receive it.

Q. You didn't receive it?

A. I didn't.

Q. And it is your statement you denied receiving it in the Justice Court?

[fol. 384] A. That is right.

Q. That is not a mistake?

A. That is not a mistake. There is a transcript of that.

Q. At the time, Mr. Burchard, this lease expired were you familiar with the terms of the option agreement?

Mr. Lewright: We object to the phraseology of the question. It is a question for the jury to determine whether it expired. If he wants to frame his question "whether or not"——

Mr. Tarlton: I believe the lease speaks for itself. I am interrogating him about it.

Mr. Lewright: We object to the phraseology of the question, because that is a matter for the Court to determine.

The Court: Read the question.

Mr. Lewright: We don't object to asking whether or not on the 14th of March, 1945, he was familiar with the terms

of the lease. We object to asking whether or not it had expired.

The Court: Objection overruled.

Mr. Lewright: Exception.

Q. Were you familiar with the terms of this option agreement on March, 1945, March 14, 1945?

A. I wasn't.

Q. Yet you were the manager in charge of this business?

A. That is right.

Q. You prepared the audit on the business?

A. Yes sir.

Q. Familiarized yourself with the profits and losses and profits expected to be made in the business, didn't you?

A. Yes sir.

Q. And didn't know what the rent for the ensuing year was to be?

A. I didn't know it provided for $25.00 more than it had been the past year.

[fol. 385] Q. Hadn't you read the lease?

A. I had no opportunity to read it. We didn't have it. We tried to get it.

Q. Have you discussed it with Mr. Mayes?

A. Yes sir.

Q. He advised you it was a $25.00 increase for the next year?

A. No sir.

Q. Had you seen the lease the year before?

A. No sir. Before he went away we tried to get it.

Q. Had you not had the lease for six months?

A. No sir.

Q. Didn't you so testify you had?

A. No sir. The entire testimony is I never did have that lease. I testified that.

Q. Is this your signature?

A. Yes sir.

Q. You wrote that letter?

A. Yes sir.

Q. Did you know what you were talking about in writing it?

A. Yes sir.

Q. Didn't you acknowledge in this letter, "Having heretofore exercised my option to rent the quarters of Playboy, at 701 N. Water Street for another year, I inclose herewith

check for $275.00 for the rent to April 14th, 1945. Since you had borrowed our contract last fall, I was not aware that the rent was raised $25.00 a month, until you gave me back the contract yesterday. I trust that this is in full compliance with our obligations to date. If not kindly advise me at once." In that letter you state you had had the contract until the fall preceding, didn't you?

A. No sir.

Q. What did you mean, "Since your borrowed," "Since you had borrowed our contract last fall I wasn't aware the rent was raised,"——

A. Because when I represented Mr. Mayes and discussed [fol. 386] with Mr. Jackson the problems involved in a proposed sale of the building I was given to understand that he had borrowed Mr. Mayes' copy of the contract. The testimony is that Mr. Mayes had never had a copy of the contract, because Mr. Jackson had failed to give him a copy of the contract.

Q. Just answer my question. Your statement——

Mr. Lewright: Just a minute. We object to interrupting the witness when a question is being answered and the witness is still answering when counsel interrupted him. He asked, "Why did you say that in that letter," and the witness is explaining, and we submit he is entitled to complete his answer.

The Court: Go ahead.

Mr. Lewright: Go ahead.

Q. Have you completed your explanation?

A. I will repeat my answer. When Mr. Jackson discussed this matter last fall——

Mr. Lewright: Would you mind asking counsel to step to one side? He is standing so the jury can't see the witness.

The Court: He isn't that big.

Mr. Lewright: He is there in front of the witness.

A. When I discussed this matter I was asked by Mr. Mayes to represent him in this deal with Mr. Jackson——

Q. Was Mr. Jackson present at that time?

A. Yes sir.

Q. All right. Go ahead.

A. We met at his office over the Playboy, office on the second floor of the old Elks Club and at that time we dis-

cussed the proposition from the accounts as explained by Mr. Mayes. That was exactly the way it occurred and at that time we went int- all phases of the contract without having the contract there, and then come down to the time [fol. 387] when Mr. Mayes was notified on the 7th of January to report for induction on the 17th of Janaury. We had a lot of things to do. I asked Mr. Mayes where the contract was, and he told me——

Mr. Tarlton: We object to what he told you unless Mr. Jackson was present.

Mr. Lewright: Don't testify what Mr. Mayes told you.

A. Now, will you——

Mr. Tarlton: Proceed with your explanation. I want to give you full opportunity to make it.

A. I was given to understand——

Mr. Tarlton: We object to what he was given to understand.

A. I was told——

Mr. Lewright: Your Honor, he asked why he put in that letter that the contract was loaned to Mr. Jackson in the fall. Now, he is entitled to say why he put that in there. If he was given to understand it was loaned to him he is entitled to say, because he was asked.

Mr. Tarlton: We object to hearsay.

The Court: Objection is sustained.

Mr. Lewright: It seems to me a statement of that kind: he asked, "Why did you put that in a letter?" "I put it in there because somebody told me so." The question asks for hearsay. I will bow to your ruling. I will sit down, Judge.

A. I was told that Mr.——

Mr. Lewright: Don't testify what somebody said. The Judge has ruled you can't do that.

The Court: If it was in the presence of Mr. Jackson—Was Mr. Jackson present?

A. I am just willing to state what I know and honestly trying to do it, if the lawyer will let me.

Mr. Tarlton: We object to any hearsay.

The Court: But when——

[fol. 388] A. I will tell you why I put that in that letter. Want me to tell you why I made that statement?

Mr. Lewright: That is what he asked.

Mr. Tarlton: Withdraw the objection and let him state why.

The Court: We don't want supposition here.

Mr. Tarlton: Go ahead and state your full why.

A. The reason I made that statement in there was because I understood that Mr. Jackson had Mr. Mayes' copy of the contract, and bringing it down to the time Mr. Mayes went away in January I asked him for a copy of the contract. Mr. Mayes told me—I don't want——

Mr. Tarlton: Go ahead.

A. Told me that Mr. Jackson had it, but that it didn't make any difference because it was his understanding that was on file at the court house and I could get it there, and that is true, and then I had the records searched at the court house trying to find it. Then I attempted to contact Mr. Jackson from the 1st of March to the 15th, and was informed all of the time by his office he was out of town, and in the mean time Doc Mason was coming to me and telling me he had bought the building and asked what I was going to do, so I told him I would do exactly what the contract provided for; that that was my understanding if it sold by March 1st, we had to give possession March 15, and if that was the fact I will release, but I can't get that contract. I have tried to get it from Mr. Jackson and searched the records and I can't find it, and Mr. Mason said, "Pay your rent to Mr. Jackson," as we had been paying it.

Q. You knew everything about the contract except it had been increased $25.00 a month?

A. I know what I told you.

Q. You had never discussed with Mr. Mayes what the rent was?

A. I asked for the contract.

Q. Had you seen the contract in May of 1943?

[fol. 389] A. I never saw it until March 19, 1945.

Q. I am asking you about the original contract of March, 1943.

A. I say I knew that one from both Mr. Moore and Mr. Mayes. We had been unable to locate that copy of the contract.

Q. Ever ask Mr. Jackson what the terms of the option were?

A. I didn't know all the terms of the option in there. I understood it had another year if it hadn't been sold.

Q. You didn't understand you had a lease calling for a twelve months term expiring March 15, 1945?

A. I had no way of knowing that because Mr. Jackson had our contract.

Q. Mr. Mayes knew it. You heard him testify?

A. I am advised he knew *aht* it was. Then I asked for the contract. I would go by the contract. That is why I wanted it.

Q. In this letter you say, "Since you borrowed our contract last fall I wasn't aware the rent was raised $25.00 a month"?

A. Yes.

Q. When you wrote that letter it was your impression Mr. Mayes had it until he loaned it to Mr. Jackson in the fall?

A. That is the way I understood it at the time I wrote that letter.

Q. But made that statement of fact in the letter?

A. That is observation. It wasn't a statement of fact.

Q. This statement: Since you borrowed our contract I wasn't aware of the increase in rent until you gave me back the contract. That is not a statement of fact?

A. I did make the statement based on the information I did have or didn't have relative to that contract.

Q. And when you did discover that the rent was $275.00 a month you sent your check postdated, you say through mistake, thirty days?

A. Yes sir.

Mr. Tarlton: I offer this letter in evidence too.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 17—BEA," and same being in words and figures as follows, to-wit:)

[fol. 390] PLAINTIFF EXHIBIT NO. 17

Corpus Christi, Texas,
March 21, 1945.

Mr. B. M. Jackson, Medical Professional Bldg., Corpus Christi.

DEAR SIR:

Having heretofore, exercised my option to rent the quarters of Playboy, at 701 N. Water Street for another year, I inclose, herewith check for $275.00 for the rent to April 14th, 1945. Since you had borrowed our contract last fall, I was not aware that the rent was raised $25.00 a month, until you gave me back the contract yesterday. I trust that this is in full compliance with our obligation to date. If not kindly advise me at once.

Yours respectfully, F. F. Burchard, Joe L. Mayes, by F. F. Burchard, Attorney in Fact.

[fol. 391] Q. Is that correct?

A. That is correct.

Q. Now, this is a letter in which you inclose this check of April 21, 1945?

A. Yes sir. That was to take the place of the $250.00 I had paid on the 14th.

Q. And had received back?

A. Yes sir.

Q. And you dated it as heretofore indicated, April 21?

A. Yes sir.

Mr. Tarlton: We offer in evidence now the letter of date March 21, 1945, addressed to Mr. B. M. Jackson, Corpus Christi, Texas.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 17—BEA," but having been previously offered, identified and copied into the record is not again copied.)

Mr. Tarlton: We offer in evidence the check and the letter, the check dated April 21, 1945.

(The check being by the Court Reporter marked, "Plaintiff Exhibit No. 18—BEA," same is in words and figures as follows, to-wit:)

[fol. 392] PLAINTIFF EXHIBIT NO. 18

Rent Playboy to April 14, 1945. No. 400

Corpus Christi, Texas, April 21, 1945. 194-.

Pay to the order of B. M. Jackson, $275.00 Two Hundred Seventy-five and No/100—Dollars to State National Bank of Corpus Christi, Texas. 88-126. Corpus Christi, Texas.

J. L. Mayes, Special, by F. F. Burchard.

(And no endorsements appearing on the reverse thereof:)

[fol. 393] The Court: Gentlemen, it is about 5:00 o'clock. Suppose we take this matter up at 9:00 o'clock in the morning?

(Whereupon court recessed until 9:00 o'clock A. M., May 26, 1945, at which time trial of the cause proceeded as follows:)

Mr. Tarlton: Take the stand, Mr. Jackson.

Mr. Lewright: We hadn't completed Mr. Burchard. I believe you still had him.

Mr. Tarlton: I beg your pardon.

Q. Mr. Burchard, did you bring with you that power of attorney you stated yesterday you would bring?

A. Yes sir.

Q. May I have it please?

A. (Witness handing instrument to counsel.)

Q. This is all of the agency and authority you have from Mr. Mayes?

A. Yes sir.

Mr. Tarlton: We will offer this in evidence.

Mr. Lewright: No objection.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 19—BEA," in words and figures as follows, to-wit:)

[fol. 394] PLAINTIFF EXHIBIT NO. 19

THE STATE OF TEXAS,
County of Nueces:

Know All Men By These Presents, that I, Joe Lynn Myes, of said State and County, have made, constituted and appointed, and by these presents do make, constitute and oppoint F. F. Burchard, of Nueces County, Texas, my true and lawful attorney, for me and in my name, place and stead to do any and evert act and exercise any and every power that I might or could do or exercise through any other person and that he shall deem proper and advisable, intending hereby to vest in him a full and universal power of attorney, giving and granting also unto my said attorney full power to substitute one or more attorneys under him, my said attorney, in or concerning the premises or any part thereof, and the same at his pleasure to revoke, hereby ratifying and confirming whatsoever my said attorney or his substitute or substitutes shall and may do by virtue hereof in the premises; and I agree and represent to those dealing with my said attorney in fact or his substitute or substitutes that this power of attorney may be voluntarily revoked alone by revocation entered of record in the office of the county clerk of Nueces County, Texas.

In witness whereof I have hereunto set my hand this the 22nd day of May, A. D., 1944.

Joe Lynn Mayes.

Signed and delivered in the presence of Mrs. O. L. Anderson, Esther Lamb Burchard.

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[fol. 395] PLAINTIFF EXHIBIT NO. 19

THE STATE OF TEXAS,
County of Nueces:

Before me, the undersigned authority on this day personally appeared Joe Lynn Mayes, known personally to me to be the identical person whose name is subscribed to the above and foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under the hand and seal of office, this the 22nd day of May, A. D., 1944.

(Seal) Robt. A. Sone, Notary Public in and for Nueces County, Texas.

THE STATE OF TEXAS,
County of Nueces:

I, Mrs. Henry E. Gouger, Clerk of the County Court in and for said County, do hereby certify that the foregoing instrument dated the 22 day of May, 1944, with the certificate of authentication was filed for record in my office the 8 day of Feb. 1945, at 1:50 o'clock P. M., and duly recorded the 27 day of Feb. 1945, at 4:30 o'clock P. M., in Power of Atty. Record of said County, in Vol. D on page 572.

Witness my hand and seal of the County Court of said County at office in Corpus Christi, Texas, the day and year last above written.

(Seal) Mrs. Henry E. Gouger, County Clerk, Nueces County. By Betty Mae Bates, Deputy.

Endorsements: Joe Lynn Mayes to F. F. Burchard Power of Attorney filed for record at 1:50 o'clock P. M. Feb. 8, 1945. Mrs. Henry Gouger, Clerk, County Court, Nueces County, Texas. By Susan Jones, Deputy.

[fol. 396] Mr. Tarlton: That is all.

Mr. Lewright: He didn't read this power of attorney to the jury. I will read it. (Reading same to the jury.)

Cross examination.

By Mr. Lewright:

Q. Mr. Burchard, was that power of attorney ever revoked?

A. No sir.

Q. Then at the time you informed Mr. Jackson, the plaintiff in this case, in December, 1944, that Mr. Mayes intended to exercise his option under the lease, were you acting under that power of attorney?

A. Yes sir.

Q. Mr. Burchard, when you informed Mr. Jackson that he intended to exercise the option contained in the lease, what, if any thing, did he say?

A. He made no particular comment.

Q. Did he say, "Yes, we know"?

A. He didn't say that remark or anything. I just told him we intended to exercise our option.

Q. Where was Mr. Jackson's office during December, 1944?

A. He had different places. His main office, I believe, was in the Medical-Professional Building.

Q. Did he have any occasion to be in the Playboy?

A. Yes sir.

Q. How often was he there?

A. Oh, I saw him quite frequently; every week or so.

Q. Does he have an office in that building?

A. He has a room up there he uses for consultation and business purposes.

Q. I will ask you whether or not he was in and out of that building during the time you all were doing that renovating work on it?

A. I don't recall that he was while the contractor was there.

Q. You don't know.

[fol. 397] A. I saw him in December in that building.

Q. I mean while you were doing the work and while you were closed? In other words, did he know you were renovating the premises?

A. I have every reason to think so, yes sir.

Q. You say you wrote that letter in April, I believe, at the time in which you state that the lease had been delivered to him in the fall, and the reason you hadn't made the $2[illegible]5.00 payment was you didn't have possession of the lease? When you made that statement you had been informed or believed the lease had actually been loaned to him in the fall?

A. That was my understanding at that time.

Q. Then in the trial of this case in the Justice Court I think Mr. Jackson testified?

A. Yes sir.

Q. What did he testify to in that trial relative to where that copy of the lease was?

A. He said it had at all times been in his possession.

Q. In his possession. I believe you stated from about March 1st to March 19th, you had been attempting to get in touch with Mr. Jackson?

A. Yes sir.

Q. How often did you attempt to get in touch with him?

A. I called his office many times.

Q. Was he in town?

A. I was informed just before the 15th of March he was out of town and not expected back until after the 15th.

Q. At the time you sent the $250.00 check on the 15th day of March, did you know at that time that the lease provided for renewal for $275.00 a month?

A. No sir. I didn't know that.

Q. There has been offered in evidence a so-called post dated check, dated on April 21, also letters, one on April 21, March 21, also a letter dated March 19, wherein your [fol. 398] $250.00 check was returned. I will ask you whether or not on March 19 in company of Doc Mason you had occasion to go to the office of Ben Vaughn?

A. Yes sir.

Q. What was the circumstance?

A. Mr. Mason had been coming to my office occasionally since early in February and telling me he had bought the building.

The Court: Mr. who?

A. Mr. Mason.

The Court: All right.

A. And it was my understanding that if the building sold by March 1st, that we would have to vacate our lease as of March 15th, and Mr. Mason knew it all of the time that I was trying to get——

Mr. Tarlton: We object to his understanding.

Mr. Lewright: Don't state what Mr. Mason knew. Go ahead.

The Court: Objection sustained.

Q. Without stating what Mr. Mason knew, what happened?

A. I was trying to get——

Mr. Tarlton: We object to his statement the lease provided if sold before March 1st as being an attempt to vary the terms of a written instrument. The lease makes no such provision.

Mr. Lewright: Well, we will see what it provides.

Q. I notice in the original lease dated March 14, 1944, that it contains in clause II, "In the event of the sale of the building Lessee agrees to surrender his lease at the option of the purchaser, on or after March 14, 1944? Then in place of "5" it has the "5" crossed out in ink with the "4" writting in there in ink. Do you know when that change or alteration was made in the lease?

A. I don't know.

Mr. Tarlton: We object to the reading of the lease, how it shows on or before the changes on the "5". The objection is the witness' testimony is contradictory because [fol. 399] he said his understanding was that if the sale was made before March 1st—The lease speaks for itself.

Mr. Lewright: The question was, did he know that change was made in the lease, and he said, "No." What is your objection, counsel?

Mr. Tarlton: The objection is that his testimony was contradictory of the terms of the lease wherein he testified that the lease provided if a sale was made before March 1st——

Mr. Lewright: That is not the question. The question was, did he known when that change was made in the lease, and his answer is "No."

Mr. Tarlton: That wasn't the question objected to. I made the objection and counsel asked another question. My objection is to the statement, and I move to strike out, wherein the witness sought to vary the terms of this instrument by his statement that the lease contained a provision that if a sale was made before March 1st, he would vacate.

Mr. Lewright: In reply to that objection, may it please the Court,——

The Court: Let the Court Reporter read the objection.

(The statement and objections were read by the Court Reporter.)

Mr. Lewright: What is the ruling?

The Court: It is the opinion of this Court that the lease speaks for itself.

Mr. Lewright: All right. What has that to do with my question whether or not he knew when the change was made in the lease?

Mr. Tarlton: No objection to that question, Your Honor. There were two objections; one came in reading of counsel, and the other was as to the witness stating the contents of the instrument.

[fol. 400] The Court: Mr. Mayes, did *you* sign the lease?

A. Mr. Mayes signed the lease.

The Court: You didn't have anything to do with it?

A. No sir.

Mr. Lewright: He says he doesn't know when the lease was made.

The Court: All right. Go ahead.

Q. I will ask you to state whether or not in the Justice Court in the trial of this case this Exhibit A was identified by Mr. Jackson as a carbon copy of the original lease?

A. Yes sir.

Mr. Tarlton: We object to the introduction of the carbon copy when the original is the best evidence; has the signatures and is offered in evidence.

Mr. Lewright: We want to show the change made in the lease.

Mr. Woods: That lease is signed by Mr. Jackson.

Mr. Tarlton: Yes, and that lease wasn't delivered.

Mr. Woods: That is the copy turned over to Mr. Burchard. It is an exact copy except when it was turned over to him he found that change in the date.

Mr. Lewright: Let's get this point. What we want to show is the change in the original lease in ink by some person after it was executed. The original lease offered in evidence was written on typewriter March 1, 1945, and in the original lease as now offered in evidence the "5" has been changed to a "4" in ink. Now, we will offer the carbon copy, which was identified by Mr. Jackson in his testimony in the Justice Court as being a true copy of the original lease, and it read 959, "1945."

Q. Please state whether or not in Justice Court Mr. Jackson stated he didn't know who made that change?

A. He so stated.

[fol. 401] Mr. Tarlton: We object to it on the ground it is secondary evidence, and contradictory of the original offered.

Mr. Lewright: We are offering the two to show the original lease didn't provide "1941"; it provided "March 1, 1945."

Mr. Tarlton: The original is the only one offered.

Mr. Lewright: If an original instrument has been altered a party can show the alteration at any time, and we are showing now that the original lease was altered; not charging Mr. Jackson with doing it, because he says he doesn't know who altered it, but we are entitled to show the alteration.

Mr. Tarlton: They offered the—The original lease is offered. The other tender was made by them in Justice Court, and impeaching of the original lease without testimony other than hearsay.

The Court: The original was offered in Justice Court?

Mr. Lewright: And the copy was offered in Justice Court.

The Court: By who?

Mr. Tarlton: The original was offered in the Justice Court; in the Justice Court the exhibit is "Defendant Exhibit"; offered by them.

Mr. Lewright: Yes sir, and now offered by them.

Mr. Woods: And Mr. Jackson testified it was the same. He didn't know who made the change. His name was on the copy.

Mr. Lewright: Look on the lower left hand corner of the copy, Judge.

The Court: Whose possession was this original lease in?

Mr. Lewright: Mr. Jackson's.

The Court: Whose possession was the copy in?

Mr. Lewright: Mr. Jackson's.

Mr. Tarlton: Those are facts, Your Honor, to be proven.

Mr. Lewright: And have been so testified and proved here, and Mr. Jackson won't deny it.

[fol. 402] Mr. Woods: They were in Mr. Jackson's possession until that case went to trial and were produced then, both of them, by Mr. Jackson for the first time in the trial in the Justice Court. He still had them up to that time.

The Court: Both the original and copy?

Mr. Woods: Yes sir.

The Court: I am of the opinion that the original will stand, that the original will be admitted.

Mr. Lewright: What about the copy, Judge?

The Court: No.

Mr. Lewright: Sir?

The Court: No sir.

Mr. Lewright: You sustain objection and the Court will not permit us to show this alteration?

The Court: That is right.

Mr. Lewright: To which we except. The Court won't permit us to show the original was changed without the knowledge *of* consent of the parties?

The Court: After it had been in the possession of Mr. Jackson, both of them, the original——

Mr. Lewright: And the copy, yes sir, and you won't permit us to show that Mr. Jackson, the plaintiff in this case, kept both of them and while in his possession the original was changed? That is your ruling?

The Court: That is right.

Mr. Lewright: We except.

Q. When for the first time did you see the lease?

A. On March 19, 1945.

Q. All right. In Mr. Vaughn's office?

A. Yes sir.

Q. Now, what was the occasion, coming back to your conversation with Doc Mason, when did Doc Mason come to you relative to the matter as the result of which you made the trip to Mr. Vaughn's office?

[fol. 403] A. On the 19th of March, '45.

Q. What did you do then relative to getting in touch with Mr. Jackson?

A. Mr. Mason told me that he knew where the lease was and that Mr. Jackson had it and was at his office, and give me his private number to call.

Q. What did you do?

A. I called Mr. Jackson and asked if he would be there. He said he would be there and I told him, "Doc Mason and I are coming over to see you."

Q. All right. Then what did you do?

A. We went to Mr. Jackson's office or his apartment in the Medical-Professional Building.

Q. What conversation did you have with him?

A. I asked him if I might see the lease or a copy of the lease. He said, "I sent that file up to attorney Vaughn's office a few days ago. Your copy is there and you can get it from him."

Q. What did you do?

A. We went to the Nixon Building to Mr. Vaughn's office.

and Mr. Vaughn produced the file and showed me the original lease and a copy of the lease.

Q. All right. Was that the first time you knew the rental was increased from $250.00 to $275.00 a month?

A. That is the first time I ever saw it.

Q. What did you do?

A. I told them I would be glad to pay the extra $25.00.

Q. Rent to be what?

A. I would be glad to pay the extra $25.00 or the @75.00 a month.

Q. What did Mr. Vaughn say?

A. He said they didn't want to do that.

Q. All right.

A. They wanted the building. They wanted the business.

Q. What else did he say?

[fol. 404] A. He said he would write me a letter and tell me that they wanted the building, and send back my check for the rent.

Q. That was what date?

A. March 19, 1945.

Q. March 19th?

A. Yes sir.

Q. That was four days after March 15th then?

A. Yes sir.

Q. Now, I notice this lease provides for these payments on the first day of each month. To your knowledge at any time during the life of this lease or the other lease were payments ever made the first day of the month?

A. They were not.

Q. I will ask you whether or not in the life of both leases if Mr. Jackson accepted the rental from the 19th of the month up to sometimes the first, or thirty days later?

A. Yes sir, and even as long as two months and seven days on part of it.

Q. As I understand it is correct now the check you say you inadvertently wrote April 21 instead of March 21, you had been to Ben Vaughn's office, attorney for plaintiffs, in this case, who was acting for the plaintiffs according to Mr. Jackson, and offered to pay the $275.00 rental and he refused to accept it?

A. Yes sir.

Q. Is that correct?

A. That is correct.

Q. Any doubt or question about that?

A. That is actually the way it was.

Q. Now state in Justice Court what if any other tender was made of the rental then.

A. From the witness stand I tendered two months payment in cash.

Q. Did you have the money in your possession then, lay it down?

A. Yes sir.

[fol. 405] Q. All right. I will ask you to state whether or not, what if anything when you made the tender, what did Mr. Koch, the attorney for the plaintiffs, say?

A. He asked if the plaintiffs wanted to accept the money.

Q. What did they say?

A. They said no.

Q. I will ask you whether or not when you filed the first amended original answer in this case on May 3, 1945, if at my request you gave me $825.00 to present in the registry of this court?

A. Yes sir.

Q. And that is three times $275.00?

A. $825.00.

Q. Do you have the receipt from the Clerk of the court?

A. Yes sir.

Q. The original was given to you?

A. Yes sir.

Mr. Lewright: We offer it in evidence.

Mr. Tarlton: All right.

(Same being by the Court Reporter marked, "Defendants Exhibit No. 20—BEA," and being as follows:)

[fol. 406] DEFENDANT EXHIBIT No. 20

Corpus Christi, Texas, May 21, 1945.

Mrs. Henry E. Gouger, County Clerk, Corpus Christi, Texas.

In Account With B. M. Jackson, et al. vs. Joe L. Mayes, et al. Civic Case #3624. Recording Fees on Enclosed Instrument No. —.

Received of Defendant Joe L. Mayes, the sum of $825.00 in cash, for account of tender of rentals to plaintiffs in accordings with Mayes first Amended Original answer.

Mrs. Henry E. Gouger, Co. Clerk, by Marie Young, Deputy.

[fol. 407] Q. Mr. Burchard, has the plaintiffs' present attorney, or any one connected with the plaintiffs, ever at any time made any demand upon you, or as far as you know upon Mr. Mayes, for any rental bill under the terms of this contract, either for the first year or second year?

A. They have not.

Q. Have they constantly refused to accept the rentals to your knowledge?

A. Since March 15th?

Q. Yes sir.

A. They have refused all of them.

Q. Never at any time made any demand upon you?

A. No sir.

Q. Did they at any time before March 1st, 1945, make any demand upon you for rentals?

A. No sir.

Q. Did they at any time before March 14, 1945, make any demand upon you for rentals?

A. No sir.

Q. I believe this check that Mr. Tarlton called a post dated check, I will ask you to read what it has endorsed in the upper left hand corner?

A. Rent Playboy to April 14, 1945.

Q. Was that on there at the time you mailed it to Mr. Jackson?

A. Yes sir.

Q. Did Mr. Jackson question anything about the check because it was post dated?

A. No sir.

Q. I see. Now, how long have you been keeping Mr. Mayes' books and accounts, Mr. Burchard?

A. Well, I have been attending to income taxes for him for some years, and kept his books during 1944.

Q. What equipment does he have in that place?

[fol. 408] A. The usual equipment that goes with a beer and restaurant business, the booths and bar, which is running clear across the building, and the cooling equipment for refrigerating beer and soft drinks.

Q. How much cooling equipment does he have?

A. They have a large number of cooling vats or boxes extending all the way across the building under the counter.

Q. Yes.

A. And some outside of the counter.

Q. Is that electric or just ice?

A. No, it is cooled by ice.

Q. What plumbing fixtures and equipment in the building?

A. They have equipment for sterilizing glasses, the usual hot water vats required by the Health Department to sterilize each glass as used.

Q. When was that installed?

A. The last time we installed that, we thought we had to replace what we had been using a make a new installation, or thought it was advisable to do that. I believe that was December '44.

Q. Was that done after you notified Mr. Jackson you intended to exercise the option of renewal?

A. Yes sir, it was.

Q. Is that a part of the $400.00 item of expense you have testified to?

A. Yes sir.

Q. Now, Mr. Burchard, in your judgment what is the reasonable market value in place of all of that equipment of Mr. Mayes' located in that building for use in the position in which it is?

A. To a going con-ern it would be worth considerable money, but take it out and junk——

Q. How much is considerable money?

A. Cost about $4,700.00.

Q. Cost $4,700.00?

[fol. 409] A. Yes sir.

Q. In your judgment is you jerked it out of there and it had to be sold on the open market what would it bring?

A. We would be lucky to get $1,000.00 for it.

Q. During the year, January 1, 1944, to December 31, 1944, what were the earnings of the business net over and above depreciation and expenses of operation?

A. Around $7,500.00.

Q. Around $7,500.00 net. How long have you lived here in Nueces County?

A. Six years.

Q. During that six years period of time and during the last two or three years have you or not had occasion to

familiarize yourself with the location of various buildings and with the occupancy of them in the business area of Corpus Christi?

A. Yes sir.

Q. I will ask you whether or not there is any location in Corpus Christi, Mr. Burchard, that Mr. Mayes could take his property out of this building and establish a business in another location?

A. After a thorough investigation I know there is no such location.

Q. You have made an investigation?

A. Yes sir.

Q. When did you do that?

A. Ever since Doc Mason begin telling me he had bought the building; last December and January he told me that.

Q. How long has that been going on?

A. Four months. He has been telling for the last year that he had bought that building.

Q. I will ask you whether or not in the Justice Court Mr. Jackson testified in this case that since *of* the 1st of March Doc Mason was his manager of that building?

Mr. Tarlton: We object until the proper predicates are laid.

[fol. 410] Mr. Lewright: I think your objection is good. Withdraw the question.

Q. But in any event since the time you notified Mr. Jackson that you intended to exercise the option up to this good date, no demand has ever been made on you, and as far as you know no demand has ever been made of Mr. Mayes, for the rent?

A. That is right.

Q. On the contrary, they have refused to accept it?

A. That is correct.

Mr. Lewright: That is all.

Redirect examination.

By Mr. Tarlton:

Q. When did you say you began to keep books for Mr. Mayes?

The Court: What was the question?

Mr. Tarlton: I asked him when he began to keep the books for Mr. Mayes.

A. I kept them all during '44.

Q. Did you in '43?

A. I don't know whether I did or not.

Q. But all during '44?

A. All of '44, yes.

Q. Commencing the 1st of January?

A. That is right.

Q. In the set-up of those books did you set up the liabilities due by Mr. Mayes?

A. No. We are on what is known as a cash basis. We don't accrue our accounts. We pay them then they are due.

Q. You didn't advise yourself as to what amount of money he owed during the year 1944?

A. Any amount of money owing for merchandise in connection with the business I certainly did. Yes, I set that up.

Q. But his rental contract for 1944, you didn't familiarize yourself with and set up on your books?

[fol. 411] A. I set it up every month on the books when it was paid.

Q. When it was paid?

A. Yes sir.

Q. As to the rent to become due you didn't have any idea what amount he owed for rent?

A. Oh, yes. It was paid before it was due, or on the date it was due, or shortly thereafter.

Q. Whatever he paid in rent in 1944 you set up on the books?

A. Yes, sir.

Q. From January 1st?

A. That is right.

Q. You knew that the rental for 1944 of those premises was two hundred for the first three months was $225.00 a month?

A. No, I wouldn't say I know that.

Q. What rental did you set up on this building for January and February, 1944?

A. Whatever the checks show. He made that record. He wrote his own checks, and then when they came back he turned them over to me, and I made the records. He had a record of that business. Whatever the checks showed they were for—they are in evidence—that is what I set up.

Q. Did you familiarize yourself with the terms of the lease he was held under in January and February, 1944?

A. No, I have repeatedly sworn I never saw the lease. I didn't know what it had.

Q. I mean the Moore and Mayes lease?

A. I tried to get it from Mr. Moore.

Q. When did you try to get the 1943 lease extending to March 1st, 1944, March 14th?

A. You mentioned two dates. What was the question.

Q. I understand there is in evidence a lease that Mr. Moore and Mr. Mayes executed with Mr. Jackson for these other parties, March 14, or 15, 1943. When did you first see that lease?

[fol. 412] A. I saw that lease March 19, 1945, at Mr. Vaughn's office.

Q. You saw both leases on that date?

A. Yes sir.

Q. For the first time?

A. That is right.

Q. And you had never discussed the terms of those with Mr. Mayes?

A. No, I hadn't.

Q. You did know from checks received that there had been an increase on rental in 1944, after the 15th of March?

A. Beg your pardon

Q. You did know that there had been an increase in the rental commencing the 14th of March, 1944?

A. No, I wasn't consciously aware of that.

Q. You never discussed with Mr. Mayes what the rent was to be, 1944, to March, 1945?

A. No. I took his checks as being correct. I didn't figure he would pay any more on the rent than he should pay.

Q. As a matter of fact you didn't know there was any option to be exercised in the lease?

A. I had been told there was.

Q. You had been?

A. Yes sir.

Q. Who told you?

A. Mr. Mayes.

Q. Did he tell you what the terms were?

A. No, he didn't tell me.

Q. He just told you he had an option and didn't have a lease and wanted you to exercise the option?

A. He had an option good to March 14, 1946, if the building wasn't sold.

Q. But he didn't ever tell you what obligations he had to perform to continue that option or mature it into a new lease?

A. No, he didn't tell me.

[fol. 413] Q. That is the original lease, is it not, executed by Mr. Moore and Mr. Mayes?

A. Yes sir.

Q. In it is a provision that, "Lessee has option to rent for $250.00 a month, all terms and conditions remaining the same, for one additional year, and $275.00 per month for the second additional year with all terms and conditions remaining the same." That is correct, is it not?

A. That is what is in there. You have read it correctly, yes sir.

Q. And also in that lease is a provision that, "In the event of the sale of the building Lessee agrees to surrender his lease at the option of the purchaser, on or after March 14, 1944."

A. That is right. We knew we had to give up our lease if it was sold.

Q. And you had to give it up on March, any time on or after March 14, 1944?

A. No. We didn't never agree to that. That is the altered lease. That is that change in there.

Q. What is in this the original lease that this alter- lease is substituted for, whatever you call it?

A. What is meant?

Q. Isn't it provided in the original contract that Mr. Mayes and Mr. Moore made with Mr. Jackson that in event of sale of the property he would surrender possession on or after March 14, 1944?

Mr. Lewright: We object to what is in the original lease that was substituted on March 14, 1944. It is wholly immaterial what the provisions were with Moore and Mayes. The only question is what are the provisions in the lease of March 14, 1944. The same objection counsel made yesterday when I was interrogating the witness, and you sustained, about the original lease.

Mr. Woods: Your Honor ruled out that lease of 1943.

Mr. Tarlton: It is admitted in evidence without objection.

Mr. Lewright: What is the ruling as to whether or not it is immaterial and irrelevant as to what that lease contained.

[fol. 414] Mr. Tarlton: I would like to be heard on the objection, Your Honor.

The Court: All right. Go ahead.

Mr. Tarlton.: The lease is offered in evidence, Plaintiff Exhibit No. 1, of date February 13, 1943, was made for a period of one year with the option of renewal at $275.00 a month to commence March 14, 1944. That lease is in evidence, and it also provides for cancellation in event of sale after March 14, 1944. We desire to show and think it relevant to show on the issue to show there has been and this is to show the lease and which Mr. Mayes signed with Mr. Moore contained the same provisions as the original contract and permitted the same option, and it is material and relevant on the issue both as to knowledge on the part of Mr. Mayes, which is admitted, and knowledge on the part of this witness, who contradicts by his testimony he had no knowledge of increased rental, and second, it is admissible to show there was no alteration.

Mr. Lewright: Are you through?

Mr. Tarlton: I am through.

Mr. Lewright: Your Honor has already ruled we can't show that there was any alteration. That was your ruling just now, a few minutes ago. Therefore, there is no issue before the Court and jury. Your Honor has cut us off at the knees. This man has just testified and the undisputed proof shows he never saw that lease until he got it from plaintiff or plaintiff's counsel on March 19. Therefore, the purpose that counsel says he offers it for is immaterial and irrelevant and not tenable. In the second place, if admissible, the lease is the best evidence, and he has no right to ask the witness what it contains. He can read that to the jury.

[fol. 415] Mr. Tarlton: That has been read to the jury. I am testing this witness' credibility. I don't believe his statement that he didn't know this increased rental was provided for. I don't know whether the jury does or not. He has no halo of infallability around him that protects him.

Mr. Lewright: We are not wanting to enforce that lease. We want to enforce the lease of March 14, 1944, and counsel knows it, and in the second place he says he seeks to show by this lease that this man is not telling the truth, that he doesn't believe him. Most assuredly he will believe his own client when his own client positively testi-

fied he had that at all times until this man got it March 19th, or saw it in Mr. Vaughn's office.

Mr. Tarlton: Nothing in here that Mr. Jackson will or has so testified. We have a right to show any circumstances that might indicate knowledge on the part of——

The Court: Mr. Tarlton didn't object to the——

Mr. Lewright: Yes sir.

The Court: —To the '43 lease?

Mr. Tarlton: No. I objected to the introduction in evidence of checks showing delay payments in 1943 lease. That is what I objected to, and what the Court sustained. I offered in evidence as Plaintiff Exhibit No. 1 this instrument that they are now objecting to.

Mr. Lewright: Judge, if you will recall, in making your ruling on the objection of Mr. Tarlton, Your Honor stated that the 1943 lease was out of the picture.

The Court: That is right.

Mr. Lewright: Now, Your Honor has refused to permit us to show an alteration in the 1944 lease. Therefore, none of this has any relevancy.

Mr. Tarlton: In a question——

[fol. 416] The Court: The 1944 lease is the one in question, is it not?

Mr. Lewright: Yes sir.

Mr. Tarlton: That is all this suit is on, but evidence or circumstances of the existence of a former contract to show the identical terms as this one, we submit is admissible in contradiction of his testimony or proof.

Mr. Lewright: It doesn't contradict anything.

The Court: Asking that of the witness to impeach the witness?

Mr. Tarlton: I am trying to impeach his credibility, show by circumstances he knew or should have known as bookkeeper, agent and attorney in fact for Mr. Mayes, what the terms and increases were.

Mr. Lewright: The witness testified he never saw that lease. It was never in his possession. He never saw it until March 19, 1945.

The Court: And the 1943 lease is in evidence?

Mr. Lewright: Yes sir.

The Court: It should be admitted; no objections were made.

Mr. Lewright: He objected. We didn't object.

Mr. Tarlton: I offered the '43 lease in evidence for the purpose, and while I didn't limit it in the tender, for the purpose of showing the continuity of the transaction in the carrying of identical terms. We are not seeking to enforce any rights under the 1943 lease. We want to show knowledge this man denies of the existence of the facts that that lease contained the figures, actually provided for the identical thing.

Mr. Lewright: That contract is discarded by the new lease.

Mr. Woods: He can't show knowledge unless the man saw the lease. He offered the '43 contract and when we [fol. 417] started to go into it you stated the '43 lease was out of the case, and we say Your Honor should be consistent, and we say you will, and rule that out and stand on the '44 lease.

Mr. Lewright: Furthermore proving the contents or terms of the old lease would have no relevancy. This is the new lease in question here. This provision of the new lease we sought to show to the jury, that the new lease did not provide for sale on March 1, 1944, but for sale after 1945.

The Court: Objection sustained.

Mr. Tarlton: Note our exception. I understand the exception was sustained.

Q. You went to Mr. Vaughn's office on March 19th, I believe you stated?

A. Yes sir.

Q. You at no time prior to April 21, 1945, tendered any payment of the rental provided for in this 1944 extension of the option?

A. Oh, yes, I had.

Q. You had?

A. Yes sir.

Q. When did you do that?

A. On March 14, 1945.

Q. You tendered $275.00?

A. I tendered check for $250.00.

Q. But you never at any time prior to April 21, or March 21, tendered $275.00 to anybody for your rent due March 14?

Mr. Woods: We object, may it please the Court, because the witness has stated he made the tender upon that.

Mr. Tarlton: The $275.00?

Mr. Woods: No sir. Offered to pay the additional $25.00 and Mr. Vaughn refused to take it on the 19th day of March.

Mr. Tarlton: I have a right to cross examine this witness, Your Honor, and he just admitted that there is, the [fol. 418] only tender of check or money he made was the tender of date March 14, 1945, for $250.00.

A. That wasn't your question.

Q. Isn't that——

A. You asked if I had made tender prior to April 21.

Q. Prior to March 21 and changed to March.

A. I told you I had made tender.

Q. You had?

A. Yes sir.

Q. In what amount?

A. On the 14th of March I made tender of $250.00, sent it through the mail, as mentioned. The envelope is here. It shows when it was.

Q. On the 14th of March you tendered $250.00?

A. That is right.

Q. And you made no other tender until March 21 when you sent a check dated April 21 for @ 75.00?

Mr. Lewright: We object to that. That is not in accordance with the testimony. The witness testified to another tender on March 14th.

Mr. Tarlton: I object to counsel interrupting.

The Court: Let the witness testify.

Mr. Lewright: I am making an objection, Your Honor.

The Court: Objection overruled.

Mr. Lewright: Exception.

The Court: And let the witness testify.

Q. Did you by check or by money, proper legal tender, offer anybody $275.00 until you sent this check on April 21?

A. Yes, I did.

Q. You did? Was that by check?

A. I sent them a check for $250.00 on the 14th.

Q. All right. Answer my question. When did you send a check for $275.00?

[fol. 419] A. The $275.00 was sent on the 21st.

Q. Of what?

A. Of March, 1945.

Q. And that was a check dated April 21?

A. That was one where I made the mistake in dating the check, although I recited what it was. The check shows what it was for.

Q. You dated the check April 21?

A. Yes, I made that fool mistake.

Q. And at no other time did you tender $275.00?

A. I did.

Q. When?

A. Just exactly in the manner I have stated.

Q. In which; when was that?

A. Well, when I went to Mr. Vaughn's office they had the check for $250.00, and I read the contract and decided the check should have been $275.00. I said I would be glad to pay the extra $25.00, and they said, "We don't want it." Turned me down.

Q. You issued no check then for the $25.00?

A. No sir. I didn't offer a check. I offered to pay them the money.

Q. Did you offer the money?

A. I didn't get out the money and lay it out. I told them I would do it.

Q. That is what I am asking you. You can answer it.

A. I made the offer.

Q. Were you in the notion?

A. Yes sir.

Q. And you ran this man's business under a general power of attorney, but you didn't know the terms of the lease that he was wanting to enforce?

A. That is right. I had made every effort humanly possible to get it, and they know it.

Q. Except of inquiring of Mr. Mayes?

A. I did inquire of Mr. Mayes before he went away. [fol. 420] That is the time Mr. Mayes said Mr. Jackson had it.

Q. You didn't inquire of Mr. Mayes what his recollection for the next year was?

A. I knew the lease would show. That is why I wanted the lease. He told me he thought it was on file in the court house. I couldn't find it recorded. I would have formed

my own understanding of what it contained if I had a chance to read it.

Mr. Woods: This has all been gone into by Mr. Tarlton previously in his examination of this witness.

Mr. Tarlton: I think I have a right to cross examine the witness.

Mr. Lewright: As long as he doesn't repeat. Might be here all next week if he keeps on trying the case all over again.

The Court: Question the witness and let's get through.

Mr. Tarlton: I will get through with him. I think the jury is probably all indifferent.

Q. You never inquired of Mr. Mayes what the terms of this lease were?

A. No, except just in a general way.

Q. And he never told you?

A. Yes, he told me we had a lease good until March 14, 1946, unless it was sold by March 1st.

Q. He didn't tell you he had an option agreement?

A. No. He said we had a lease. He didn't use the word "option".

Q. You heard him testify he was fully familiar with the terms of the lease and the increased rental and the fact——

A. His testimony will show what he testified to.

Q. Did you hear him say that?

A. Will you please repeat that question?

Mr. Tarlton: Mr. Alexander, read the question. I can repeat it.

Q. You heard him testify that he was familiar with the [fol. 421] term of the lease that required him to exercise the option to pay $275.00 a month?

A. I heard his testimony as much as you can a man that speaks as low as he does. I think that was his testimony.

Q. Now counsel asked about this lease and this provision for monthly payments, on the 1st day of the month you paid rentals on the first rental installments as they became due on the 15th of the month, I believe that is correct, except in a few instances where some delay?

A. Yes sir.

Q. Let's read the terms of the lease in regard to the rental: "This agreement between Franklin Flato, Fred Flato, Robert Flato, B. M. Jackson and Harry G. Heaney

hereinafter styled lessor, and J. L. Mayes hereinafter styled Lessee, witnesseth: 1. That the lessor hereby leases unto said lessee that certain portion of the Elks Club Building situated in Corpus Christi, Nueces County, Texas, described as follows: Ground floor only, excluding elevator and entrance thereto, also access to hot water heating plant to be used as — for the term of 12 months, beginning on the 15th day of March, A. D., 1944, and ending on the 14th day of March, A. D., 1945, or until this lease is terminated in the manner set out, for the agreed rental stipulated and the observance and performance by lessee of the matters and conditions hereinafter specified." I believe it is your statement you didn't know it was a one year lease or a lease for twelve months?

A. No. It has always been my understanding they had an agreement for three years.

Q. "2. Said lessor——

Mr. Lewright: Which lease is that?

Mr. Tarlton: The lease of March 14, 1944.

Q. "2. Said lessee promises and agrees to pay to the lessor or to his order, as rental for the premises above [fol. 422] described and leased, the sum of $3,000.00 at the rate of $3,000.00 per annum during the terms of this lease, and holding over thereafter; said rentals payable in advance on the first day of each month during the term and continuance of this lease, in monthly installments of $250.00, at the offices of the lessor in said building, together with interest at the rate of ten per cent (10%) per annum on past due insfallments until paid, and a reasonable attorney's fee should the claim for such rent be placed in the hands of an attorney for collection after maturity." Now, you observe, don't you, that the monthly rental periods began the 15th of the month, don't you?

A. Yes sir.

Q. And your obligation was to pay rent at the rate of $250.00 on the first of each month?

A. That is what the lease says.

Q. And that lease didn't say calendar month, did it?

A. The word "calendar" isn't there.

Q. The provision is that the lease commenced on the 15th of March, 1944?

A. That is in there. I'm not interpreting that lease.

Q. That is in there?

A. On the first of the month we paid 15 days a month ahead of time.

Q. Is that according to that?

Mr. Lewright: We object, may it please the Court. The interpretation of the lease is a question of law for Your Honor——

Mr. Tarlton: The witness is seeking——

Mr. Lewright: Let me complete my objection, Mr. Tarlton. If the lease provides for payment on the first of the month and if on the 15th of the month they paid the rent they were paying two weeks in advance. The is the question of law and not an interpretation by this witness, nor by a lawyer interrogating him. The facts speak for themselves, and we submit the witness should not be harangued.

[fols. 423-425]

Mr. Tarlton: The witness has testified to a construction, and argued wherein he finds that construction.

Mr. Lewright: We further object because it is immaterial what his *imper*pretation may be of the lease. That is something for Your Honor.

Mr. Tarlton: We will leave it to Your Honor, and withdraw the question.

Q. Now, the lease also provides that if you hold over you are to pay $275.00 a month for holding it.

Mr. Lewright: We object to that. The lease speaks for itself. This business of asking a witness what an instrument provides for—the instruments speak for themselves.

Mr. Tarlton: That is all, Mr. Burchard.

Mr. Lewright: That is all, Mr. Burchard.

Mr. Tarlton: We will call Mr. Jackson. Mr. Jackson, just a moment please. Mr. Vaughn is a member of the Bar and as such I think is excused from the rule.

The Court: What was that?

Mr. Tarlton: Mr. Vaughn will be a witness and as a member of the Bar he is excused from the rule.

The Court: All right. Counsel agrees to that, won't they?

Mr. Lewright: Oh, yes.

Mr. Tarlton: We next offer in evidence to the Court in the determination of jurisdiction the transcript of the judgment and proceedings in the Justice of the Peace

Court, showing date of the filing of the petition, the date of the issuance and service of process, and date of hearing and judgment of the Court below.

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[fol. 426] PLAINTIFF EXHIBIT No. 21

No. 5095

B. M. JACKSON, ET AL,

vs.

JOE L. MAYES, ET AL

In the Justice Court, in and for Precinct No. 1, Place No. 2, of Nueces County, Texas.

JUDGMENT

This, the 3rd day of May, 1945, came on to be heard the above entitled and numbered cause in the above mentioned court, and came the defendant, Joe L. Mayes, by his attorney, LeGrand Woods, and presented his motion for continuance, based upon the Soldiers' and Sailors' Civil Relief Act, and the court having considered said motion and argument of counsel thereon, finds that the ability of the defendant to conduct his defense in this cause is not materially affected by reason of his military service and absence from the trial on account thereof, and said motion for continuance was by the court overruled, to which action of the court the defendant in open court excepted.

Thereupon all parties announced ready for trial, and a jury having been waived, the court heard the pleadings, the evidence presented by all parties, and the arguments of counsel, and having considered the same, and being of the opinion that the judgment should be in favor of the plaintiff.

It is, therefore, ordered, adjudged and Decreed that B. M. Jackson, Franklin Flato, Frederick Flato, Robert Flato and Harry G. Heaney, plaintiffs, have restitution, for which let writ issue, of the premises described in their complaint, to-wit:

The ground floor of that building known as the Elks Club Building, being at 701 Water Street, on the northwest corner of Starr and Water Streets in Corpus Christi,

Nueces County, Texas, and all costs of suit, for which let execution issue; to which judgment Joe L. Mayes and F. F. Burchard, defendants, then and there in open court [fol. 427] expected, and gave notice of appeal to the County Court of Nueces County, Texas.

Carl Crow, Justice of the Peace, Precinct No. 1, Place No. 2, Nueces County, Texas.

Endorsement: Filed May 10, 1945 Mrs. Henry E. Gougher, County Clerk, Nueces County, Texas, Claudine Toupe, Deputy.

[fol. 428] Mr. Tarlton: We next offer in evidence as admission against interest sworn allegations of plaintiffs', of the defendants' original answer——

Mr. Lewright: If any part of it is offered we ask for the whole instrument to go in.

Mr. Tarlton: We will get to that as we come to it. We offer such portions as we desire as admissions under his sworn pleading. We first offer paragraph 3 of the answer, and paragraph 4, and the affidavit. Those statements are offered as admissions against interest.

Mr. Lewright: No objection

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 22—BEA," and same being in words and figures as follows, to-wit:)

[fol. 429] PLAINTIFF EXHIBIT No. 22

III

The defendant Joe L. Mayes would show the Court that on the 14th day of March, A. D. 1944 he entered into a written lease with Franklin Flato, Robert Flato, Fred Flato, B. M. Jackson, and Harry G. Heaney, acting by and through B. M. Jackson, as lessors, whereby he leased the ground floor of the Elk's Club Building, being 701 Water Street on the northwest corner of Starr and Water Street in Corpus Christi, Nueces County, Texas, for a period of one year from March 14th, A. D. 1944 to March 14th, A. D. 1945, at the rent of Two Hundred Fifty ($250.00) and No/100 Dollars per month, with the option and privilege to rent said premises for an additional year for the

sum of Two Hundred Seventy-five ($275.00) and No/100 Dollars per month. That said Joe L. Mayes took possession of said premises under and by virtue of said written lease and is now occuping said premises.

In the meantime he was inducted into the United States Army where he is now a soldier and unable to look after his business affairs in the City of Corpus Christi; Nueces County, Texas.

IV

That after March 14th, A. D. 1945 the defendant F. F. Burchard, agent of the defendant Joe L. Mayes, and acting on the behalf of and looking after said Joe L. Mayes, business, he exercised the option under said lease of renting above described premises for an additional year. Said F. F. Burchard, defendant, did not have said written lease in his possession as same had been borrowed by B. M. Jackson and same was still in the possession of B. M. Jackson.

That defendant F. F. Burchard had been paying Two Hundred and Fifty ($250.00) and No/100 Dollars per month as rent on said building prior to this time and not having said lease in his possession, or access to same, he sent B. M. Jackson check in the usual amount of [fol. 430] Two Hundred Fifty ($250.00) and No/100 Dollars for a month's rent, which check was returned to him on the 19th day of March, A. D. 1945 by Ben F. Vaughn, Jr., Attorney, stating that his lease had expired.

That defendant F. F. Burchard did not know the exact amount of the rent, and as soon as he discovered that the rent was $275.00, instead of $250.00 per month, he again sent the said B. M. Jackson a check for $275.00 as payment on said rent, which, up until this time, said check has not been returned to him.

STATE OF TEXAS,
County of Nueces:

Before me the undersigned authority on this day personally appeared F. F. Burchard, one of the defendants in the above cause, who, acting for himself individually and as agent of Joe L. Mayes, on his oath states that the

matters of fact set out in the foregoing defendants answer are true and correct.

F. F. Burchard

Subscribed and sworn to before me by F. F. Burchard on this the 3rd day of May, A. D. 1945, to certify which witness my hand and seal of office. John C. Penn (John C. Penn), Notary Public in and for Nueces County, Texas. (Seal.)

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[fol. 431] B. M. JACKSON, called as a witness by the Plaintiffs, first having been duly sworn, testified as follows:

Direct examination.

By Mr. Tarlton:

Q. What is your name, please?
A. Bush M. Jackson.
Q. Where do you live, Mr. Jackson?
A. 410 Chaparral Street, Corpus Christi, Texas.
Q. What business are you engaged in?
A. Managing business properties, rental properties.
Q. Are you one of the owners of the premises involved in this controversy?
A. Yes sir.
Q. Who are the other owners?
A. Myself, Lt. Robert Flato, Franklin Flato, Frederick Flato, and Dr. Harry G. Heaney.
Q. Did you for yourself and as agent for the other owners enter into any lease contract with Mr. Mayes, the defendant here, Joe L. Mayes.
A. Yes sir.
Q. Is this the contract that Mr. Mayes made with you?
Mr. Lewright: Which one is that?
Mr. Tarlton: This is the contract of February, March 14, 1944.
Mr. Lewright: '44?
A. Yes sir.
Mr. Tarlton: The executed contract.

Q. What was the occasion of the executing this contract, Mr. Jackson?

A. I had an original lease with Mr. Mayes and Mr. Moore on the same property, and Mr. Mayes reported that Mr. Moore was getting out of the contract and he wanted another lease to cover just him as owner.

[fol. 432] Q. I hand you this contract. In regard to the termination of the lease in event of sale, what was your agreement with Mr. Mayes?

Mr. Lewright: We object to that as immaterial and irrelevant. The contract is the best evidence. Your Honor has heretofore ruled we can't show that the contract was changed or altered. Therefore, the contract as drawn is the only matter before the Court, and it is immaterial what he said his agreement was. The contract is the conclusion of the minds of the parties.

Mr. Tarlton: Withdraw the question.

Q. Is the contract as it was when executed and delivered?

Mr. Lewright: We object to that for the reason Your Honor has heretofore held we couldn't show alteration. Now, most certainly, he can't show it hasn't been altered.

Mr. Tarlton: I think we can show it is an identical one to this.

Mr. Lewright: We just ask Your Honor to be consistent; that is all.

Mr. Tarlton: We think——

The Court: Objection sustained.

Mr. Tarlton: Objection sustained?

Q. Is that the contract you made with Mr. Mayes?

A. Yes sir.

Q. Now, when the contract was executed, Mr. Jackson, how many copies of the contract were made?

A. It is my recollection there was six copies, original and five copies.

Q. Was any copy of the original left with Mr. Mayes?

A. A copy was given Mr. Mayes, yes sir.

Q. Did you ever at any time borrow that copy from Mr. Mayes?

A. I didn't.

Q. Did you at any time subsequent to the execution of the contract on the date including I believe the 14th of [fol. 433] March, 1944, receive any request from Mr. Mayes

or from his agent, Mr. Burchard, for a copy of that contract prior to March 14 or 15, 1945?

A. No ir.

Q. Did either of them ever ask you for the contract?

A. No sir.

Q. When the contract as made in the defendants' answer as shown there expired on March 14, 1945, had Mr. Mayes or Mr. Burchard for Mr. Mayes made any statement to you that they desired to renew the contract for another year?

A. No sir.

Q. Were you ever tendered the rent provided for in that contract on or before the 15th of March in the sum of $275.00 as provided for in the contract?

A. No sir.

Mr. Tarlton: May I have your emended answer?

Mr. Lewright: Yes.

Q. Did you, Mr. Jackson, in all of your negotiations and in the contract provided that the lease was subject to your right of sale at any time on or after March 15, 1944?

Mr. Lewright: We object. The lease is the best evidence of what it provides, may it please the Court, and further it is immaterial and irrelevant, regarding which question of sale which Your Honor has ruled we can't show an alteration and change in it, and further no contention here, and right of recovery is not based upon or sought to be based on any alleged sale of the property.

The Court: Read the question.

Mr. Tarlton: I will withdraw the question. Just withdraw the question.

Q. When, if ever, did Mr. Burchard communicate with you and request a copy of this lease?

A. He never did.

Q. He never did?

[fol. 434] A. Wait a minute. He did, I believe he made some question either the 18th or 19th, asking a copy, 19th of March, asking for a copy, and I told him it was in the possession of Mr. Vaughn, our attorney.

Q. Did he at that time give you any explanation as to why he didn't have his copy?

A. He said he didn't know what the terms were.

Q. Did he tell you why he didn't have a copy?

A. No sir.

Q. Did he tell you you had borrowed his copy at that time and he wanted it back?

A. No sir.

Q. In the defendants' answer it is alleged that, "The Defendants further show unto the Court that on April 13, 1945, the plaintiffs herein, acting through another attorney, Honorable B. D. Tarlton, returned to defendants herein another check which defendant Burchard had mailed to the plaintiffs in payment of such March-April rental, for the sum of $275.00, and in which said plaintiffs, through their said attorneys, advised defendants as follows: 'The owners' position is that the lease terminated and that the parties in possession are occupying it as trespassers. Please be advised if the property is not surrendered peacefully that you will be called upon to produce this check (the $275.00 check returned with said communication) at the trial for the recovery of possession, or secondary evidence of its contents will be offered.'" Is that the check that was tendered to you and that was returned in accordance with the letter filed and pleaded by the defendant?

A. Yes. It is a post dated check that was mailed to me.

Q. Prior to that time on March 21, 1945, when this post dated check was delivered to you had Mr. Burchard or Mr. Mayes or any one for them tendered you the $275.00 called for in the lease?

A. No sir.

[fol. 435] Q. What conversation did you have with Mr. Mayes in December, Mr. Jackson?

A. I had several conversations with Mr. Mayes in December with reference to a deal pending with K. Wolens for the occupancy of some part or all of the property. K. Wolens was interested in expanding their department store and I believed from the remark Mr. Mayes made to me or understanding wherein if as long as I worked out a satisfactory deal with K. Wolens I could buy his interest in his lease that he had at that time a disturbance whether or not it was good business to do so.

Q. Did that deal fall through?

A. It did.

Q. At that time did Mr. Mayes tell you he was going to renew his option?

A. He didn't.

Q. Did he at any time tell you he was going to renew his option?

A. He never has.

Q. Did Mr. Burchard at any time tell you he was going to——

A. He never has.

Q. Did you receive any communication when you, the check of $250.00 was transmitted to you in March or March 14 or 15, 1945, that they were exercising their option?

A. I did. Did I receive a letter?

Q. Yes.

A. With the $250.00?

Q. Was there any letter of transmittal?

A. I don't recall there was.

Q. Did you at that time by letter or otherwise receive any notice from them that they were extending the lease under the provision of the option?

A. I didn't get the question.

Q. Did they at the time the check for $50.00 was transmitted to you state they intended to extend the lease under the terms of the option?

[fol. 436] A. No.

Q. They didn't?

A. They didn't.

Q. When was the first time you heard from Mr. Mayes or Mr. Burchard that they desired to execute the option?

A. He has never said that they desired to exercise the option. He sent me a letter with a check. As I recall the wording was, "Having heretofore exercised my option," which he concluded with a check. That letter, I believe.

Mr. Tarlton: Let me see.

A. Yes sir, this is the letter.

Q. Is that the first notice you had from him that he claimed he had exercised or he was going to exercise the option?

A. Yes sir. That is the first notice I had.

Mr. Tarlton: I believe that is all, Mr. Jackson.

Cross-examination.

By Mr. Lewright:

Q. Mr. Jackson, you say that the second lease on March 14, 1944, was prepared because of the fact that Mr. Moore had sold out to Mr. Mayes and wanted to get off the lease?

A. Mr. Moore wanted to get off the lease, yes sir.

Q. That is what I say?

A. Yes sir.

Q. And for that reason you got up the second lease?

A. That is right.

Q. When was that second lease prepared?

A. Evidently on March 14, 1944.

Q. And the reason you prepared it on that date was because Mr. Moore had then sold out to Mr. Mayes and at Mr. Moore's request?

A. Yes sir.

Q. I will ask you whether or not on July 13, 1943, you wrote to Mr. O. Moore the following letter: "I have your letter of this date and in response thereto advise we release you from this lease and will hold Mr. Mayes wholly [fol. 437] responsible for the lease." Did you write that letter?

A. Let me see. Yes, I think I wrote that.

Q. I will ask you whether or not on July 13, 1943, you wrote Mr. J. L. Mayes the following letter: "I have a letter from Mr. Moore in which he states that he has sold you his half interest in the lease of the ground floor of the old Elk Club building, and I am advising Mr. Moore he is released from liability on the lease and will hold you responsible. In a telephone conversation you have stated that this is satisfactory to you. We will appreciate however your written confirmation."

A. Yes, sir, that is right.

Q. All right. I want to ask you if it is not a fact when the second lease on March 14, 1944, was only at your request in order that you could beat the real estate agent out of the commission for making the original lease?

A. No sir.

Q. Who was the agent that negotiated the original lease?

A. Mr. Cooper, W. M.

Q. What commission did you agree to pay him?

A. 5 per cent.

Q. How long did you pay him the 5 per cent?
A. Continuously.
Q. Sir?
A. Continuously.
Q. Did you pay him 5 per cent up to March 14, 1945?
A. I did.
Q. I will ask you if it isn't a fact that during the fall or winter, early winter of 1944, either the fall of 1943 or winter of 1944, that you came to Mr. Mayes and told him that you were tired of paying that commission to Mr. Cooper and if you could get a new lease after Mr. Moore sold out that you wouldn't have to pay that commission in *in* there over to Mr. Cooper?
[fol. 438] A. No sir.
Q. You deny that?
A. I deny that.
Q. When was the lease of 1944 actually signed?
A. I don't know the exact time it was signed.
Q. Isn't it a fact it wasn't signed until the summer of 1944, two or three months after March 14, 1944?
A. No sir.
Q. That is not a fact?
A. No sir.
Q. When do you say it was signed?
A. My recollection is it was signed the 14th, the day it was written.
Q. You say you delivered a copy of that lease to Mr. Mayes at that time?
A. The next day.
Q. Isn't it a fact in the trial of this case in the Justice Court you stated you didn't know whether you had or hadn't delivered him a copy?
A. I didn't.
Q. You didn't so testify?
A. Didn't.
Q. You are positive of that fact?
A. Yes sir.
Q. Did you say you delivered a copy of the lease to him at that time?
A. I said I delivered a copy of the lease to Mr. Mayes.
Q. In Justice Court you testified to that?
A. Yes sir.
Q. All right. Now, when was your deal with K. Woiens first taken up; did you say it was October 1944?

A. I believe the first time I took it up with them was in '33 under the original lease.

Q. '43?

A. Yes, with Mayes and Moore.

[fol. 439] Q. Isn't it a fact it wasn't taken up now until October, 1944?

A. It could have been.

Q. And at that time you had a conversation with Mr. Mayes about buying him out?

A. I don't know about at that time.

Q. You won't deny if was in October?

A. No sir.

Q. Isn't it a fact your K. Wolens deal fell through about December, 1944?

A. I don't know when it fell through.

Q. Sir?

A. I don't know when it fell through.

Q. Isn't it a fact during the first of December, 1944, you told Mr. Mayes and Mr. Burchard it had fallen through?

A. I told one or both it had fallen through.

Q. Isn't it a fact at that time they both advised you of the fact they were going ahead and renovate the premises and occupy it for the additional years?

A. No.

Q. You deny that?

A. I do.

Q. Now, Mr. Jackson, when for the first time did Doc Mason get an interest in this building?

A. When did he get an interest in it?

Q. Yes sir.

A. Around 1941, '42 or '43, somewhere along there.

Q. Around 1941, 1942 or 1943?

A. Somewhere along there.

Q. What kind of a contract or agreement, do you have a contract or agreement or understanding relative to this building with Doc. Mason?

A. At this time?

Q. Yes.

[fol. 440] A. Yes sir.

Q. When was that made?

A. Made in October, 1944.

Q. October, 1944?

A. Yes sir.

Q. At that time you had your negotiations with K. Wolens on, is that right?

A. They were still under negotiations at that time.

Q. Is that contract with Mason in writing?

A. With Mason?

Q. Yes sir.

A. Yes sir.

Q. I will ask you whether or not the contract, the substance of that contract is that you have leased the building in its entirety to L. K. Mason for a period of five years?

A. Beginning October 1, 1944.

Q. Beginning the 1st of October, 1944?

A. Right.

Q. And at that time you had outstanding with Mr. Mayes that lease with the option that was good to March 14, 1945?

A. Right.

Q. On March 14, 1945, you and Mason were both hopeful he wouldn't pay the rent?

A. It didn't make any difference to me.

Q. Sir?

A. It didn't make any difference to me whether he paid it or not.

Q. What rental is provided under the Mason lease?

A. $10,800.00 a year.

Q. What rental is provided under this lease with Mr. Mayes?

A. Old lease?

Q. Mr. Mayes' lease?

A. $250.00 a month.

Q. $3,000.00 a year, isn't that?

[fol. 441] A. Yes sir.

Q. $275.00 a month next year would be just about $600.00 additional?

A. That is right.

Q. So under one $3,600.00 and the other $10,000.00 and yet that didn't make any difference one way or the other whether they paid the rental or not?

A. My testimony is to the jury he leased it subject to the existing contract and Mason receives the $250.00 a month as credit against his lease.

Q. Isn't it a fact that on March 14, 1945, that you, Bush Jackson, were hopeful that they would fail to pay the rent and fail to pay a sufficient amount?

A. It made no difference to me. I had my rent in advance from Mason, and didn't matter whether Burchard or Mayes paid. Didn't make any difference.

Q. In other words, you would just as soon get $3,600.00 as $10,000.00?

A. No sir. I had my $10,000.00.

Q. You had your $10,000.00?

A. I had six months in advance.

Q. When was that $10,000.00 payable?

A. Paid me $5,400.00, six months in advance.

Q. When?

A. I don't remember the exact date; sometime in October.

Q. Was that by check?

A. By check.

Q. You knew that Mr. Mayes' lease provided for additional option for $275.00?

A. Yes sir, I knew that was in the contract.

Q. Actually you have no personal interest in this matter at all? It is really Doc Mason owns the premises for the five years, has right to possession for the five year period of time, is that correct?

Mr. Tarlton: We object to the question as calling for a [fol. 442] conclusion of law the Court should determine.

Mr. Lewright: The same method of cross examination pursued by opposing counsel.

Mr. Tarlton: I believe the Court ruled right and sustained the objections when properly made, and when he calls on this witness for a conclusion of law I think the objection is proper.

The Court: What is the question?

Mr. Lewright: The question is, he doesn't have the lease actually, and therefore can't testify under the complaint. Mason has the lease under his testimony. The Mason lease is for five years. He has received the first six months rent under the Mason lease in advance. That lease is in full force and effect. Then he, Jackson, Flato and the rest are not proper parties plaintiff in this suit. They are not entitled to possession of the premises. If anybody would be it would be Mason, and this suit falls to the ground.

Mr. Tarlton: Yes sir, by reason of being the owners of the building they had the right to maintain a suit of this kind on behalf of Mason. We wouldn't have had a right to file the suit in his name.

Mr. Lewright: Most assuredly you would have been.

Mr. Tarlton: We would have interpleaded him.

The Court: The lease—Just a minute. Who was the lease between?

Mr. Lewright: The Flato's, Mr. Jackson and the Flato's and Doc Mason, lease for five years they gave him.

The Court: Objection sustained.

Mr. Lewright: To which we except.

Q. What is the provision of the lease with reference to what is to be conducted in the premises?

A. Which lease?

Q. The Doc Mason lease?

[fol. 443] Mr. Tarlton: We have carried along with this in the interest of time. I haven't objected to the contents of the instrument. The witness has agreed to everything up to now, but in the meantime I object to it furtlier.

Mr. Lewright: What is the ruling?

The Court: Sustained.

Mr. Lewright: We except, Your Honor.

Q. Has Doc. Mason taken possession of any portion of the building?

A. He has taken entire possession of the building, either March or April 1st.

Q. April 1st?

A. Yes sir.

Q. He hasn't gotten possession of these premises because you are trying to get them for him now?

A. That is right.

Q. He has the entire building except this?

A. He has the entire building because he collected the $250.00 rent prior to March 14, this year.

Q. Now, Mr. Jackson, you say Doc Mason collected the rental prior to March 14th?

A. That is, I gave him the checks from November, yes sir.

Q. You gave him the checks?

A. Yes sir.

Q. What did you do, endorse them over to him?

A. Yes sir.

Q. When did you start turning the check over to Mason?

A. I turned the cash over to him. I didn't endorse them to him.

Q. I thought you said you endorsed them?

A. I endorsed the checks and turned the cash over to him.

Q. In other words you cashed the checks and turned the money over to Doc Mason?

A. Yes sir.

Q. When did you start doing that?

[fol. 444] A. November.

Q. November, '44?

A. November, '44.

Q. Now then, you say these premises are owned by Edwin Flato, B. M. Jackson and Harry G. Heaney?

A. Lt. Robert Flato with the armed forces.

Q. Does Edwin Flato know the fact this suit is filed and being prosecuted?

A. I don't know.

Q. Did you ever talk to him about it?

A. I didn't.

Q. Did you ever tell him you were kicking this boy in the Army at Camp Hood, you were kicking him out of the——

Mr. Tarlton: We object to "kicking him out."

Mr. Lewright: Withdraw the "kicking out."

Q. Did you tell him you were going to put this boy out of the building and give it to Doc Mason?

Mr. Tarlton: We object to that. He can ask, "Did he tell him he was going to bring this suit," but the legal consequences is a conclusion of law.

The Court: Objection sustained.

Mr. Lewright: To which we except.

Q. Did you ever tell Mr. Flato you were going to file this suit?

A. Which Flato.

Q. Edwin Flato?

A. No sir.

Q. Does the old gentleman know you are pursuing this course of conduct?

A. I don't know that he does.

Q. In fact you know he doesn't because he wouldn't approve of it?

Mr. Tarlton: We object to what somebody else would or wouldn't approve of.

The Court: Objection sustained; highly prejudicial and the jury is instructed to disregard the question.

[fol. 445] Q. Does Dr. Harry G. Heaney know it?

The Court: The jury is instructed to disregard that question.

Mr. Woods: Does Your Honor rule we can't ask the question about one of the owners of the building?

The Court: The question wasn't——

Q. I will ask you this question: Does Dr. Harry G. Heaney know of it?

Mr. Tarlton: We object to the question as to what Dr. Heaney knows or doesn't know. He can testify, of course, whether——

Mr. Woods: His name is on this suit. It is brought in the name of Dr. Heaney. We are seeking to find out if he knows it.

The Court: Objection overruled.

Mr. Tarlton: And only Dr. Heaney can testify as to what he knows.

Q. Does Dr. Heaney know it?

A. Not to my knowledge.

Q. Now, what other Flato—You say there are other Flato's interested?

A. Yes sir.

Q. Who is the other two?

A. Frederick Flato.

Q. Where is Frederick Flato?

A. Where is he? I don't know.

Q. He is in the United States Army, isn't he?

A. I don't know.

Q. Does he know of the institution of this suit?

A. He does.

Q. How did he learn of it?

A. By hearing counsel and me discussing the case.

Q. Is there another Flato?

[fol. 446] A. Still another, yes sir.

Q. What is his name?

A. Franklin.

Q. Is he in the armed service?

A. He isn't.

Q. Does he know of this suit?

A. He does.

Q. How did he learn of it?

A. By consultation.

Q. When and where?

A. We had one conference in his office at the Corpus Christi Hardware Company office.

Q. The other is Robert?

A. Robert.

Q. Where is he?

A. Armed forces.

Q. Does he know of it?

A. I don't know whether he knows of it.

Q. Now, Mr. Jackson, acting as agent for your other owners and yourself, if that $250.00 check had been written for $275.00, that on *on* March 15, 1945, would you have accepted it?

A. Mailed to me on that dated?

Q. Yes.

A. I don't know whether I would or not.

Q. As a matter of fact——

A. Since I didn't get it I don't know what I would have done.

Q. As a matter of fact, you know you wouldn't have accepted it because you were hoping he would default?

A. I don't know that.

Q. You don't?

A. No sir.

Q. You won't answer that to the jury?

A. I have answered it. I don't know.

[fol. 447] Q. You didn't know. When you got the post dated check, if that check hadn't been post dated would you have accepted it?

A. No sir; I wouldn't have accepted it.

Q. And that was on March 21st you got the post dated check?

A. That is my recollection of it.

Q. Therefore, without four days after March 15, 1945,

you wouldn't have accepted the rental if paid to you in cash, would you?

A. I don't think I would have.

Q. You were standing upon the supposed default of March 15, were you not?

A. My opinion it wasn't supposed. I believe it was a default.

Q. Well, you claimed it to be a default. You were standing on that?

A. That is right.

Q. And wouldn't have made any difference if he had brought the cash?

A. Wouldn't have taken it on that date?

Q. Yes.

A. That is right.

Q. Wouldn't have made any difference if he brought the cash on March 19th?

A. I don't believe it would.

Q. Sir?

A. I don't think it would.

Q. You prepared the lease, didn't you?

A. Yes sir.

Q. Wrote it up yourself?

A. I worded the typewritten portion.

Q. The rest is printed form?

A. Yes sir.

Q. Mr. Mayes didn't have anything to do with the preparation of it?

A. Yes sir. He agreed on the terms.

Q. He wasn't there with you when you prepared the lease, was he?

A. No sir.

[fol. 448] Q. He didn't have anything to do with the actual physical preparation of it?

A. That is right.

Q. And if the lease provided for payment on or before the first of the month and he made payment on the 19th of the month it wouldn't have made any difference?

A. If he brought cash after the 14th of the month I wouldn't have taken it.

Q. All right. Did you attempt or make any attempt to cash the post dated check?

A. I didn't.

Q. Have you ever at any time made any demand upon Mr. Mayes or Mr. Burchard for any rental payable under the terms of this contract?

A. No.

Q. Did you before March 15th or after March 15th?

A. What year?

Q. Sir?

A. What year?

Q. 1945?

A. No.

Q. You know, of course; what he was sending the post dated check for? It is marked the Playboy rent account.

A. I couldn't tell you what it was for. I saw what was on it.

Q. Even though it was post dated, even though it was cash you wouldn't have accepted it?

A. That is right.

Mr. Lewright: That is all.

Redirect examination.

By Mr. Tarlton:

Q. This lease you made to Mr. Mason involved the entire building, didn't it?

A. Yes sir.

Q. The lease described, offered in evidence, described [fol. 449] only the ground floor?

A. That is right.

Q. What size is the building?

A. Three story building.

Q. Three story building?

A. Yes sir.

Q. Now, in regard to the bringing of this suit, did or not the Flato's, or any of them, participate in the conferences preceding the filing of the suit?

A. They did.

Q. And authorized its filing?

A. Yes sir.

Q. Who transacted the business in response to the partnership in the building, Mr. Flato or his son?

A. His sons.

Q. What is the condition of Mr. Flato's health, do you know?

A. Senior?
A. Yes.
A. Very bad, I understand.

Mr. Tarlton: I believe that is all.
Mr. Lewright: That is all.

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[fol. 450] Ben Vaughn, called as a witness by the Plaintiffs, first having been duly sworn, testified as follows:

Direct examination.

By Mr. Tarlton:

Q. What is your name, please?
A. Ben Vaughn.
Q. Mr. Vaughn, in this matter by whom were you employed and who do you represent?
A. Well, I represent the Flatos from time to time on various of their matters. I am not retained by them. I don't represent them in all matters, but some matters I do.
Q. In the matter of the lease or continuation of the lease under the option agrement of Mr. Mayes were — representing the Flatos or looking after their interest?
A. They consulted me about the matter.
Q. Did you have a conversation with Mr. Burchard about the 19th of March, 1945?
A. Yes sir, I did.
Q. Just state to the jury what that conversation consisted of or of what it consisted?
A. Well, Mr. Jackson and Mr. Mason and two Flato boys were in my office on the 19th, as I recollect, and Mr. Burchard and Mr. Mason came back on the afternoon of the same day, and Mr. Burchard and Mr. Mason came back, I presume to discuss with me what Mr. Burchard was going to do with reference to the premises. He came in and advised me he was agent for Mr. Mayes and that he didn't know exactly what Mr. Mayes wanted to do, whether he wanted to continue with the building or whether he didn't want the building, and that if we would give him time to get in touch with Mr. Mayes and find out what he wanted to do he would let us know as soon as he could. I said, "The continuation—His lease has terminated. I want to

give you this check back." He says, "I am just acting as [fol. 451] agent." I says, "All right. You go ahead and I will mail it to you." So I returned that same day that check of $250.00 to him.

Q. I believe your statement was he told you he didn't know whether Mr. Mayes wanted to continue——

A. He said he was acting as agent and knew Jackson and Flatos had asked possession of the premises. They asked for possession when he was up there. He says, "Gentlemen, I can't tell what to do. I am acting as agent. I have to communicate with Mr. Mayes to get my instructions. Give me time to communicate with him."

Q. Did he tender an additional $25.00 with the $250.00 check?

A. He didn't. He made no additional tender. He refused to take back the check I offered him. I told him I would write him, as he was acting as an agent, so he would have the record. I believe he asked for a copy of the lease, which was given to him.

Q. Did he make at that time any statement as to why he didn't have a copy?

A. He said somebody borrowed it sometime, April or November, because somebody had borrowed his copy, so I got it.

Q. Somebody had borrowed his paper?

A. Maybe he said "His" or "Their copy." I don't remember; he said "His" or "Mayes'" copy.

Q. Did he say who borrowed it?

A. I think he announced Mr. Jackson had. Mr. Jackson said he didn't. They had some argument about whether Mr. Jackson had borrowed his copy or not.

Q. Is that all of the conversation at that time?

A. That is substantially the conversation.

Q. Did you have a subsequent conversation with Mr. Burchard?

A. No sir.

Mr. Tarlton: That is all.

[fol. 452] Cross-examination.

By Mr. Lewright:

Q. As a matter of fact Mr. Jackson wasn't up there?

A. He was up there in the morning.

Q. Isn't it a fact Mr. Jackson wasn't there to argue with Mr. Burchard?

A. Mr. Jackson was there after Mr. Burchard. After he was there I asked him when he came in if he had borrowed Mr. Burchard's copy and he said, "No."

Q. I will ask you if what you told the jury isn't so, Mr. Jackson didn't argue with him?

A. That is exactly true. He didn't argue with him.

Q. You say you are attorney for the Flato's?

A. I say that I represent them in some matters. They didn't employ me in this suit. They got Mr. Tarlton for that.

Q. Is he representing the Flato's or Doc Mason?

A. You will have to ask him that. I didn't employ him. He employed me.

Q. Did you know the Flato's had a contract with Doc Mason to lease him the building for five years?

A. Certainly.

Q. You knew that?

A. Yes sir.

Q. Then when Mr. Burchard came to get a copy of the contract——

A. No, he came up there to advise with me at that time as to what he was going to do about the thing. He came to my office to talk about it.

Q. Isn't it a fact he came to see a copy of the lease?

A. While he was there he did.

Q. And came in company with Mr. Mason?

A. That is right. He came up there with him. Right before that morning when all of us was there Mr. Mason asked him what he was going to do and Mr. Burchard told him, "I don't know."

[fol. 453] Q. Answer my question.

A. All right.

Q. Isn't it a fact he came and at least during the course of the conversation he asked to see a copy of the lease?

A. Yes sir, that is true.

Q. Isn't it a fact he told you that is the first time he knew the rental was $275.00?

A. I think that is probably true. I think he said he didn't have a copy of the lease and didn't know of the rental increase.

Q. Didn't he offer to pay you the additional $25.00?

A. It isn't so.

Q. You deny that?

A. I deny it absolutely.

Q. Who was present at that conversation besides you and Mr. Mason and Mr. Burchard?

A. Nobody.

Q. No one else present?

A. No sir.

Q. What relation are you to Dudley Tarlton?

A. I married his niece.

Mr. Lewright: That is all.

Redirect examination.

By Mr. Tarlton:

Q. Were you present when Mr. Flato and Mr. Jackson discussed with me bringing suit?

A. No sir. I was in the office at that time but left before you got down to details.

Q. You brought Mr. Flato to my office?

A. That is right, came down there with them.

Q. And your statement is that this man never at any time offered you the additional $25.00?

A. No occasion for him to, no sir. He told me he didn't know whether Mr. Mayes wanted to keep it or not. He [fol. 454] asked for time to communicate with Mr. Mayes. That was substantially the request, and asked for a copy of the lease.

Mr. Tarlton: That is all.

Recross-examination.

By Mr. Lewright:

Q. And if he had given you $275.00 in cash you wouldn't have taken it?

A. I thought the lease had terminated. I would have advised them not to take it if asked my legal opinion. What they would have done I don't know.

Mr. Lewright: That is all.

Mr. Tarlton: That is all.

Mr. Tarlton: Except for production of the contract, the Plaintiffs rest, Your Honor.

(Council for Defendants announced they wished to present a motion for an instructed verdict, and the jury was instructed to return at 2:00 o'clock in the afternoon, and prior to return of the jury to the box Defendants presented motion for an instructed verdict, and argues same, and counsel for Plaintiffs replied to same.)

The Court: My opinion, I will rule on the motion, I think I will rule on the motion after I have heard the defense, I believe.

Mr. Tarlton: After you have heard evidence?

The Court: After——

Mr. Tarlton: (Replying to argument made by Mr. Lewright.)

The Court: The motion is——

Mr. Woods: I would like to be heard just a minute.

(Presenting closing argument for Defense.)

The Court: Gentlemen, the motion is set aside until such time as the defense has put on evidence. I will rule on the motion after the defendant has closed.

[fol. 455] Mr. Lewright: We desire to offer some more testimony.

The Court: That is right. In other words, the defendant has——

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F. F. Burchard, One of the Defendants, recalled as a witness by the Defendants, testified further as follows:

Direct examination.

By Mr. Lewright:

Q. Mr. Burchard, you are one of the defendants in this case?

A. Yes sir.

Q. Testified in this case yesterday afternoon or this morning?

A. Yes sir.

Q. I will ask you, if you will, to advise the jury whether or not in the office of Ben Vaughn in the Nixon Building on March 19, 1945, you ever told Ben Vaughn that you didn't know what Mr. Mayes wanted to do about this building?

A. Why, there was no such talk at all. That is just as much assumption as the statement he admits is wrong.

Mr. Tarlton: I object to that——

The Court: The jury is instructed to disregard the answer and be stricken from the record.

Mr. Lewright: Don't get excited, Mr. Burchard. Keep your head.

Q. Did any argument take place up there, Mr. Burchard?

A. Not at all.

Q. What did you say and what did he say?

A. The only conversation at all was substantially this: When Mr. Mason and I went into Mr. Vaughn's office I was introduced to him; first time I ever saw him in my life, and Mr. Mason said, "Mr. Burchard wants to get a copy" or "His copy of the contract," and Mr. Vaughn went to hi [fol. 456] file and got his file and said, "Here is your copy of the contract," and then he said, "We have your check here for the rent, and I would like to give it back to you," and I said, "No, I don't want that." There was no talk whatever——

Q. All right. What if any other conversation occurred? When for the first time did you see the contract provided for $275.00 a month rather than $250.00?

A. At the time I was in Mr. Vaughn's office. In a few minutes——

Q. When you did, what did you say?

A. I told him I would pay the additional $25.00 or give him a new check for $275.00.

Q. Is that when he said he wouldn't take it; he would send back the $250.00 check?

A. Yes sir.

Q. Was there any argument between you?

A. No, just as gentlemanly as could be.

Q. Was Mr. Jackson up there?

A. No sir

Q. Mr. Burchard, I will ask you when was approximately the time in December, '44, you had your conversation with Mr. Jackson?

A. I would say about a week before Christmas.

Q. About a week before Christmas?

A. Yes sir.

Q. When did you close the place?

A. The 24th of December.

Q. In other words, it was a week before that?

A. It was within that week, yes.

Q. Is that when Mr. Jackson informed you that the K. Wolens deal had fallen through?

A. Yes sir.

Q. What conversation did you have then?

A. I asked him if any other deals were pending for the sale of the property and he said, "No."

[fol. 457] Q. All right. Then what else was said?

A. I told him we were going ahead and renovate the building and keep it for another year.

Q. Did he say "Yea" or "Nay"?

A. He didn't make any comment.

The Court: Who were you talking to?

A. B. M. Jackson.

Q. This is Mr. Bush Jackson here, this gentleman here?

A. Yes sir.

Q. Do you know whether or not of your own knowledge Mr. Jackson did or did not give Mr. Mayes a copy of the lease when the lease was executed?

A. No, I don't know.

Q. Do you know the circumstances surrounding the execution of the second lease?

A. Yes sir.

Q. Did you have any conversations with Mr. Jackson relative to that second lease?

A. No sir.

Q. Or was that between him and Mr. Mayes?

A. That was between him and Mr. Mayes.

Q. You would only know that by hearsay?

A. Yes sir.

Q. When for the first time did you learn that Doc Mason was really the party at interest in this suit?

A. When he came to my office in February and told me he had bought the building.

Q. When did you learn for the first time instead of having bought the building he had taken a lease on it?

A. At that time we made an investigation to determine whether or not he had bought the building, and I made up my mind he hadn't bought it. I knew he hadn't been able to get the loan through to buy it.

Q. When did you learn for the first time he had a five year lease on the building?

[fol. 458] A. In the court room today.

Q. I will ask you if since the trial in the Justice Court you have had any conversation or contact with Mr. Mason?

A. Yes sir. I have talked with him.

Q. Where did you talk with him?

A. He called my house about 8:00 o'clock one night.

Q. On the telephone?

A. Yes sir.

Q. Do you know his voice?

A. Yes sir.

Q. Any question but what it was Doc Mason?

A. No sir.

Q. Detail that conversation to the jury?

A. Well, he said, "I understand you have been up to Austin." I said, "Word gets around pretty fast." I just came back late. He said, "Do you really intend to fight this case through and keep me from getting that building?" I said, "Yes." Well then he got very indignant. He said, "You are doing this because somebody is putting you up to it. You wouldn't do this if somebody wasn't putting you up to it." He said, "You try to interfere with any of my business and try to bring action before the grand jury in this town and they will run you out of town, else ruin you in your business."

Q. Did he say that calmly or unemotionally or more or less in the tone you are testifying in?

A. He said it as if he was angry.

Q. Do you intend to quit defending this suit?

A. I don't how much further he can go. He has taken very substantially away from one, one $1,200.00 account, $400.00, another $50.00 or $20.00, $1,000.00 of work they brought pressure to bear on my clients to try to pull me off this case, and told my clients if they didn't cease employing me as a public accountant the would ——

[fol. 459] Mr. Tarlton: We object to that as hearsay.

The Court: I am sure the jury would like to know how do they know these things.

Mr. Tarlton: I'm not objecting to what Mr. Mason said.

The Court: Let's find out how he knows these things.

Mr. Woods: Confine your statement to what Mr. Mason said.

The Court: Is that——

A. I am telling the truth, so help me God, exactly what I am saying to you is what Mason said to me; he was going to run me out of town.

The Court: Wait a minute. The witness hasn't testified who told him, who took these clients away from him.

Mr. Lewright: I don't think he has been asked that.

The Court: I am asking him. I think it is within the province of the Court.

Mr. Lewright: Go ahead and tell him.

The Court: Tell us how you know. I think the jury would like to know it.

A. Mr. Barney Cott, I think on Friday, telephone at 4:00 o'clock, sole owner of Pepsi-Cola Bottling Works. He came here six years ago, about the same time I did. I have been his accountant ever since a few weeks after he came here, and they said to close all of his business. I appreciated our relationship. He called me out there. He said, "Mr. Burchard, Mason is the person. I have to do it to you. Unless I pull you off on this case I couldn't sell my products in any place they own or any of the places they control, and you know they control the best places in town," and he says, "They just put it cold to me to pull you off." I said, "Mr. Cott, I don't want any man to suffer on my account. I will give you an operating statement up to the present time if you will give me an inventory. I will get up the statement and your relations and mine as client will cease, because I will not permit myself to be put in the position [fol. 460] of embarrassing a client of mine." He told me then——

Mr. Tarlton: We object to all of that as hearsay.

A. The Judge just asked me to tell it.

Mr. Lewright: The Judge asked these questions.

The Court: I am asking the questions. What else? Who else?

Mr. Lewright: Wait a minute.

The Court: Just a minute. I am asking the questions.

Mr. Lewright: I want him to finish that conversation.

The Court: Oh, all right.

A. Mr. Cott stated to me, "You are smart enough to know what you are up against, and they will do as they did at San Antonio." He says, "You know what happened up there. That man was shot and nobody arrested for it and accused of killing him. That is what occurred, and when Doc Mason and his partner——"

Q. Did you lose that account?

The Court: Wait a minute now.

Mr. Lewright: I want to find out whether he lost that account.

A. I have another client I have been with ever since he started in with his operation, all of the years here, Jack Cohn of Martin Distributing Company, wholesale distributors for Pabst and Jax Beer. I have always done his work, and put the same kind of pressure on him, told him if he wanted to — any business after the emergency is over they won't buy from him unless he bring pressure on me to keep me from trying to protect this boy in the service.

Mr. Lewright: May I ask him if he lost those accounts?

A. Another case last week called me up, a little case, the Jewish Synagogue out here. Mr. — is president. I have worked for him and for his commercial organization ever since I first came here. When I went out he asked me to take on another little account and do some work for Temple [fol. 461] Beth-El. Well, we made arrangements. Mr. Wright was the banker. Mr. Cott had recently become treasurer of Beth-El, and he wanted me to verify the bank balance that he was taking over and also set up the records from the time he had taken over. He had taken over some four or five weeks before, and I agreed to undertake it and did do that work. On Wednesday at noon I went back to my office and a call there said call Pepsi-Cola, and I called and Mr. Cott's secretary informed me that they didn't want me to do that work; that she would go ahead and use the old books. They had asked me to buy new books, and I — having difficulty getting the kind of books they wanted. I had to work written up and typewritten report for it, and then she told me they didn't want me to do the work, and that afternoon these fellows got together and bragged on the number of jobs taken away from me. So they are going to run me out of town, Judge.

The Court: Mr. Burchard, how much money did you charge Mr. Mayes for handling his business?

A. I haven't made any charge, Judge, and I haven't drawn any money.

The Court: You haven't made any charge and you haven't drawn any money?

A. You mean since he went away?

The Court: Yes.

A. No, I haven't drawn any money since he went away.

Mr. Lewright: Did you draw some before he went away?

A. He paid me some money for my work.

The Court: What did he pay you?

A. He was paying me $100.00 a month for the monthly service jobs.

The Court: Counsel on both sides I hope you realize I am trying to clarify in my mind, as well — the jurors minds, some of these things that I am sure they are thinking about.

Mr. Lewright: We understand you.

The Court: I hope you appreciate——

[fol. 462] Mr. Lewright: Quite frankly we appreciate Your Honor asking the questions. That is all.

Cross-examination.

By Mr. Tarlton:

Q. You say they got together and bragged?

A. Yes sir.

Q. About the accounts they had taken away from you?

A. Yes sir.

Q. Were you there when they got together?

A. No sir.

Q. Sir?

A. No sir.

Q. You weren't there?

A. I had left town about noon that day.

Q. Then your only information is hearsay statements?

A. I say they did it.

Q. Do you know they did?

A. I can prove they did.

Q. Do you know they did from any other idea than what somebody told you?

A. That is the only way I could. I told you I wasn't there.

Q. So that statement is hearsay?

A. That is correct.

Q. When you first talked to Mr. Mason about this he told you, you stated, he had bought the building?

A. Yes sir.

Q. Are you positive he said, "I have bought the building," or did he say, "I am going to take it over"?

A. He told me he had bought the building. He told some of my employees there and induced them to quit their job on the strength he had bought it.

Q. Who are those employees?

A. One was a waitress, Madge Recht, and the other was [fol. 463] the best one we had down there. Her name has slipped my mind for the moment.

Q. When was it he told you this?

A. Beg your pardon.

Q. When was it he told them he had bought the building?

A. In February.

Q. In February?

A. Yes sir.

Q. When did he first mention it to you?

A. He mentioned it to me first in February, first time he told me.

Q. Do you know whether he was on a contract at that time to buy the building?

A. No, I didn't know it.

Q. You don't know?

A. No.

Q. Did you tell him at that time if he bought it you were not going to insist on a continuation of the lease?

A. Yes, I told him if he did buy the building we went out as I understood the lease.

Q. You did know the terms of the lease in that regard?

A. Beg your pardon.

Q. I say, you did know what the terms of the lease were in that regard?

A. Yes sir, always been my understanding if it sold by March 1st any year we went out on the 15th of March. That has always been my understanding.

Q. That is still your understanding?

A. That is what the contract now says.

Q. And I will ask you if it provided for you to continued after the 15th of March, 1945, the rent was $275.00 a month?

A. No, I didn't know that until the 19th day of March.

Q. How many of these places are you running for Mr. Mayes?

A. Oh, I take care of all of his accounts and transactions.

Q. How many of these places does Mr. Mayes have that you have charge of?

[fol. 464] A. Three.

Q. Three. So if he lost this he would still have two left?

A. Probably.

Q. Now, when did you last talk to Doc Mason — L. K. Mason?

A. This telephone conversation. By referring to my daily journal I could tell you exactly.

Q. Well, you don't have that with you?

A. It was on a Wednesday night, Wednesday or Thursday night. I returned from Austin late one night. It was the following night, but I don't know whether that was on Wednesday or Thursday.

Q. Had you been to Austin with reference to some complaint against Mason?

A. Yes sir. That is what I went there for.

Q. You and Mr. Elliott?

A. I had nothing to do with Mr. Elliott.

Q. He didn't go with you?

A. He drove his car up there and I rode with him and his wife at that time.

Q. He drove you in his car to Austin?

A. Yes sir.

Q. Now, when was that, after the last trial?

A. After the last trial, yes sir.

Q. Did Mr. Elliott suggest you go to Austin for a complaint against this man?

A. He didn't.

Q. What did he do?

A. He was going to Austin to visit his wife's people, and I rode up with him.

Q. When after February was it you talked with Mr. Mason?

A. It was the week following the first trial of this case.

Q. Did he ever tell you he had a lease on the entire building subject to your lease?

A. No, he never did.

[fol. 465] Q. He never did?

A. No. The only statement he made to me was, he said he had bought the building.

Q. The only person that called you with reference to Mr. Mason getting your business away from you, is that correct, was Mr. Cott?

A. No, that is not the whole story.

Q. Who were the other parties?

A. I enumerated two others. I have every reason to know he did the same thing to others, but I don't want to——

Q. Who were the other two?

A. Mr. Jack Kims and Martin Distributing Company.

Q. Mr. Cohn told you that?

A. Mr. Cohn told me that.

Q. Did he tell it to you?

A. I have no reason for embarrassing him. I don't want to put him on the spot.

Q. You mentioned his name. You injected this issue.

The Court: You have to answer.

A. I have helped him on that job, and he was going ahead.

The Court: What help?

A. I have help on the jobs of my own. I don't physically do all of them. I have help with the girls that work down there.

The Court: That is not answering the question.

Q. Did Mr. Kims tell you that Mr. Mason had Martin to quit you because of this suit?

A. He told my wife.

Q. Then all you have is hearsay testimony——

Mr. Tarlton: And we ask to exclude it.

The Court: Objection sustained. The jury will disregard that answer.

Q. Did Mr. Cott tell you that?

A. Yes sir.

[fol. 466] Q. Or did he tell your wife?

A. He told me.

Q. He told you?

A. Yes sir.

Q. Who else told you, not what was said to your wife?

A. Mr. Cott's secretary told me that I was through, not to do any more work for Temple Beth-El.

Q. Mr. Cott's secretary and Mr. Cott are the only ones?
A. I have that on direct information.

Q. When Mr. Mason talked to you on the telephone did he tell you it was Mason calling?
A. Yes sir.

Q. When did Mr. Mayes leave here?
A. I believe January, 17th of January.

Q. And on the 24th of December you told Mr. Jackson, "We are going to keep the place?"
A. Yes sir.

Q. You had—You stated, "We are going to keep the place"?
A. That is right.

Q. And you had no lease on the property?
A. I was acting as attorney for Mr. Mayes in handling that particular deal; made contract for renovating the building.

Q. And getting $100.00 a month at that time for doing it?
A. Yes, that is right.

Q. The other places he has, when did you acquire those?
A. The other beer parlors?

Mr. Lewright: That is immaterial and irrelevant. We are not trying some other business. We are trying this particular premises here.

Mr. Tarlton: Withdraw the question. That is all, Mr. Burchard.

Mr. Lewright: That is all.

The Court: Just a minute, Mr. Burchard.

[fol. 467] This Court would like to know a little more about why you didn't go before the grand jury.

A. I went to the foreman of the grand jury, Mr. DeWitt McGee, and told him that I had a lot of information that I would like to present to the grand jury as to the gambling interests of Doc Mason, that I have in my possession, a list of 100 places in which Doc Mason is conducting and elsewhere gambling, slot machines, poker games, dice games and policy racket where he conducts a numbers racket, and I told Mr. McGee, the foreman of the grand jury, that I would like to know if he would be willing to go with me before Judge Westervelt and frankly tell the Judge our story and ask permission of the Judge to have one or two in-

vestigators to get out and get the information relative to these places and present it to the grand jury.

The Court: What did Mr. McGee state?

A. He said he would go with me to Judge Westervelt.

The Court: Did you go to Judge Westervelt?

A. No, I didn't.

The Court: Why?

A. I tried to make an appointment with him later and was unable to make the appointment.

The Court: You never went before the grand jury?

A. No. The grand jury isn't in session, but would have to be called back by Judge Westervelt.

The Court: You didn't attempt to go before the grand jury while they were in session?

A. No, I didn't have this information at that time. It was only after they started cutting my throat that I started a little back fire.

The Court: Did you lose any gambling money?

A. No, I didn't lose any money.

[fol. 468] Recross examination.

By Mr. Tarlton:

Q. What is your business?

A. Looking after the interest of Mr. Mayes.

The Court: I see.

Q. Where did you get this information from about the 100 gambling places?

A. Where did I get it?

A. Yes.

A. I proved it by going out and buying a lottery ticket and further by playing some of the machines.

The Court: Where did you buy a lottery ticket, from Mason?

A. Not from Mason, no.

The Court: Where did you buy your lottery ticket?

A. From a fellow on Sam Rankin Street.

Q. Who was it?

A. I don't know who he was.

Q. Where did you play a slot machine and get a play-off?

A. I never said I played a slot machine.

Q. A marble table?

A. I played a marble table at George's Cafe.

Q. Where?

A. George's Cafe.

Q. How do you know whose table it was you were playing?

A. Because I have investigated the Federal records and the stamp on it.

Mr. Woods: We believe a reasonable amount of this is alright. We have no objection to the Court interrogating this witness and bringing out anything he wants to, but we are not trying this case of gambling houses now, and getting back entirely to another matter, and we ask the Court to put an end to that particular inquiry and go forward.

Mr. Tarlton: He brought a charge that was within his [fol. 469] knowledge and this witness is subject to test of his credibility, that he had information that Doc Mason was running 100 gambling houses and I think we are entitled to the facts concerning that, whether or not——

Mr. Lewright: If this is by way of impeachment, the same is on collateral matter and Your Honor is well acquainted with that rule of law that you can't impeach a witness on a collateral matter.

The Court: It was injected by the Court.

Mr. Lewright: I know it. Therefore, Mr. Tarlton isn't entitled to impeach him on an immaterial or a collateral matter.

The Court: I think the jury is entitled to all the facts, and I feel that I brought some of these points out, and I think that the plaintiffs have the right to go in and question the witness.

Mr. Lewright: We bow to Your Honor's ruling.

The Court: O-kay. Let's go.

Mr. Lewright: We turn Mr. Tarlton loose then. Go ahead.

Q. You say you knew of 100 gambling places Doc Mason was running in——

A. I have in mind about, approximately 100 cases.

Q. That is just what you have been told?

A. Yes sir, there are a lot of them.

Q. By whom?

The Court: Answer the question.

A. I don't know who got the information.

Q. Sir?

A. I don't know who got the information.

Q. Who furnished you the list?

A. Lady in my office.

Q. By whom?

A. I don't know.

Mr. Tarlton: We move all of the *testion* this witness has given concerning gambling houses be stricken.

[fol. 470] The Court: Just a minute. Let's clarify——

Q. Mr. Burchard, if you had gone before the grand jury, how would you have testified?

A. I could only——

Q. How could you have testified to the fact that there was 100 gambling places run by Mason?

A. It was my idea I could only testify to whatever I had positive information, where I had been there and saw it.

Q. You stated you knew at least 100 places run by him?

A. I have ben told that, yes.

The Court: But you couldn't testify before the grand jury?

A. No. We wanted permission of Judge Westervelt to go out ourselves and with somebody we would employ to assist or he would suggest to assist and get the information. We knew where to go to get the information.

The Court: Gentlemen, of the Jury, you are instructed to disregard anything that is brought up about gambling. If Mr. Burchard can't testify to who or where he heard those things why——

Mr. Woods: Does that include the places he visited himself and actually participated in or just those furnished to him.

Mr. Tarlton: On hearsay as to the ownership. That would go to all of them, we insist.

The Court: You didn't testify you knew of any of them?

A. Yes, I did.

The Court: What ones do you know?

Mr. Tarlton: We ask the Court to instruct the witness to confine his testimony to personal knowledge, and not things of hearsay.

A. Well, I went around to a number of places casually and went in and had a bite to eat or cup of coffee and played [fol. 471] the machine and if lucky they returned the money since I saw other fellows do that.

The Court: Let me go a little further. How do you know that these machines belonged to L. K. Mason?

A. I have investigated that and I have——

Q. How did you investigate it?

A. I inquired of people who had them in that kind of business as to who was operating those.

Mr. Tarlton: That is hearsay, Your Honor.

A. Yes, I know it is, but he asked me.

The Court: Purely hearsay.

Mr. Tarlton: Purely hearsay. Every word he has testified about is hearsay or opinion.

The Court: It will be stricken from the record. Gentlemen of the Jury, you are instructed not to weigh that with your evidence.

Mr. Lewright: All right. Is that all, Your Honor? We have no further questions.

Mr. Tarlton: No more questions.

[fol. 472] Joe L. Mayes, one of the defendants, recalled as a witness for the defendants, testified further as follows:

Direct examination.

By Mr. Lewright:

Q. Mr. Mayes, you are one of the defendants in this case?

A. Yes sir.

Q. And previously been on the stand and testified?

A. Yes sir.

Q. Mr. Mayes, I wish you would detail to the jury the circumstances under which you were approached, if you were approached, by Mr. Jackson before you executed this second lease of date March 14, 1944?

A. Well, Mr. Jackson had sometime last year, I don't remember the exact date, had mentioned to me that he wanted to re-write that lease. It was agreeable with both of us. I told him all right. Then last summer of last fall, I would say about September, he called me one day up to his room upstairs, and said he had the lease for me to sign, and I asked Mr. Jackson if it was the same terms, if it was, made any change, changed it any. He said, no, same lease, set up everything the first lease had, and I looked it over briefly at that time; it appeared to be the same and signed it, and I asked Mr. Jackson for a copy of it at that time, and he said he didn't have it with him, but he would have one sent to me.

Q. Did he ever have one sent to you?

A. I have no idea of ever receiving it. I thought of it and I honestly thought it was in his office but never was concerned about it as I thought we could get it any time we wanted it.

Q. It is in evidence in this case that in July, 1943, Mr. Jackson wrote you and advised he had received a letter from Mr. Moore to the effect that Mr. Moore had sold out his interest to you and whereby he released Mr. Moore [fol. 473] from the lease, and he would continue to hold you, is that correct?

A. Yes sir.

Q. If you had the lease and it provided for the same extension and had substantially the same terms as this lease why was the second lease executed? Who asked for it and why did they want it?

A. I think I can clear that up all right. It is quite a little story and take a couple of minutes to tell it, and I didn't think it had any connection with this business at all.

Q. What are the circumstances of the second lease?

A. Mr. Jackson mentioned he would like to re-write that lease and incidentally, I believe he used the word incidentally, that a real estate man who had a commission in the lease and Mr. Jackson didn't approve that business paying a commission and further that this man would call him up or had bothered him about it considerably, and I

told Mr. Jackson at the time that I remembered quite well when we executed the first lease that I had a man named Tipton who worked for me, Mr. Moore and me, and he had volunteered to go up and fix up the contract with Mr. Jackson, explained he understood those matters, and I had let him represent me in discussing the details with Mr. Jackson, and I learned later—Mr. Tipton only worked for me about a week after that—I learned later that Mr. Tipton and the real estate man had collected the commission on the lease and divided it.

Q. Now, did Mr. Jackson or not tell you he wanted the second lease in order to avoid paying that commission?

A. Well, I don't remember how he expressed it.

Mr. Tarlton: We object, Your Honor. This is only on impeachment—Read the question.

Q. Did he or not tell you he wanted that lease for the purpose of attempting to avoid the payment of that commission?

A. Yes sir, and I agreed with him, and I wanted to avoid it too.

Q. I asked you did he or not?

A. Yes sir.

[fol. 474] Q.—Say he wanted that lease?

A. Yes sir.

Q. In order to avoid paying that real estate commission?

A. Yes sir.

Q. All right. Now, the lease you say wasn't actually signed until September or sometime the fall of last year although dated in March of last year?

A. Yes sir.

Q. All right. Now, Mr. Mayes, you have heard Mr. Jackson testify that you never at any time told him that you expected to exercise your option and take this lease for another year under these terms. Please detail to the jury where, *where* and under what circumstances you did inform him, if you did, that you intended to keep the property for another year?

A. Well, there never was any question about that. Last December I had been talking with Mr. Jackson a little about this K. Wolens deal and in a very agreeable manner, I thought, and I called him in December and asked him

about that transaction and he told me that the deal had fallen through, and I said in the event that the building wasn't sold before March 15th that I had another year and I would proceed because I didn't believe there was any question about that.

Q. When you told him you would proceed and have it for the other year what did he say?

A. If I remember correctly he said, "All right."

Q. And what time in December was that?

A. Well, it was the early part of December.

Q. 1944?

A. Yes sir, about the first of December *or* shortly thereafter.

Q. And is that the time he told you the K. Wolens deal had fallen through?

A. Yes sir.

Q. Did Mr. Jackson ever at any time, state in October [fol. 475] or December or any other time he had a five years lease on this property to Doc Mason?

A. No sir.

Q. For $10,000.00 a year?

A. No sir.

Q. When is the first time you learned that?

A. Today.

Mr. Lawright: That is all.

Cross examination.

By Mr. Tarlton:

Q. Mr. Mayes, I believe you stated at the outset the execution wasn't performed or not desired on the part of Mr. Jackson to avoid payment of a real estate commission. Wasn't that your original statement?

A. He didn't seem to complain about paying a real estate commission.

Mr. Woods: The second lease.

A I don't understand.

Mr. Woods: I didn't either.

Q. When you were first asked to explain and asked the question about the real estate agent, Mr. Cooper, isn't it a fact you stated that at the time you executed this.

lease in 1944, Mr. Jackson wasn't complaining about any commission to a real estate agent?

A. When I signed the original lease? At that time it wasn't mentioned at all. As I understood it the real estate man had been annoying him about the matter in some way. I don't know exactly how, and when he mentioned it to me I remembered that I had learned that a Mr. Tipton who was working for me had participated in the commission without my knowledge in the beginning, and I told Mr. Jackson it was all right with me, that it hadn't set well with me for Mr. Tipton to make the commission when we was working for me.

Q. You were the one that wanted to avoid payment of commission?

[fol. 476] A. No sir. I merely agreed with Mr. Jackson I felt the same way.

Q. What did Mr. Jackson say about getting out from under this real estate commission? What did he say about getting out from under the real estate man?

A. I don't remember the exact words, except he mentioned to me that this agent had annoyed him in some way about it, and we would also avoid the commission if it was agreeable and proper and keep the lease. I told him I would be glad to sign it, and I would like to eliminate that commission deal for the reasons I stated.

Q. You told him you would like to eliminate the commission deal?

A. Yes sir, because I didn't think a man on my time should go around the corner and participate in a commission on my lease.

Q. Mr. Jackson never told you he wanted to avoid payment of the commission on this lease?

A. Yes sir. Yes, I believe he did.

Q. In what language did he say it substantially?

A. Well, he said—I don't recall the exact language and words, but used words to the effect that this man had annoyed him about that commission and he had paid it more than a year and there was some question as to whether the commission should be paid the second year or not, whether it covered one year or two, may have been a question there, but at any rate I felt that these men were making the commission on the lease without being entitled to it, and at that time I didn't know but what I would be interested in that building for many years.

Mr. Tarlton: That is all.

Mr. Lewright: Now, did you know——

Mr. Tarlton: Just a minute, Mr. Lewright (Continuing cross examination of the witness.)

Q. Did Mr. Jackson give you a check and tell you to make Mr. Cooper give you half of it?

A. No sir. Mr. Jackson left a check at the Playboy for $50.00, payable to Mr. Cooper, about that time that this [fol. 477] conversation took place, and left word with the manager there that if I could figure out any way of keeping half of it or getting this money it was all right with him, and I appreciated that, but I couldn't think or figure out any way and I sent the check back to Mr. Jackson.

Q. Whether he continued to pay Mr. Cooper his real estate commission or not——

A. I don't know.

Mr. Tarlton: That is all.

Redirect examination.

By Mr. Lewright:

Q. Did you go to him and ask to execute a second lease to avoid the commission or did he come to you?

A. He came to me about that.

Mr. Lewright: That is all.

We call B. M. Jackson under the Adverse Party rule.

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[fol. 478] B. M. Jackson, one of the Plaintiffs, recalled as a witness by the Defendants under the Adverse Party Rule, testified further as follows:

Direct examination.

By Mr. Lewright:

Q. Mr. Jackson, did you get the original lease between you and L. K. or Doc Mason?

A. How is that?

Q. Do you have the original lease?

A. I gave it to you.

Mr. Tarlton: He gave it to you. We ask permission to offer it and withdraw it.

Q. Is this the original lease?
A. Yes sir.

Mr. Lewright: We offer the lease, subject to the right to withdraw it.

(The same being by the Court Reporter marked, "Defendant Exhibit No. 23—BEA," and being in words and figures as follows, to-wit:)

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[fol. 479] DEFENDANT'S EXHIBIT No. 23

Adopted Standard Office Building Lease

THE STATE OF TEXAS,
County of Nueces:

This Agreement, between B. M. Jackson, Harry G. Meaney, Fred Flato, Franklin Flato and Robert Flato, of Corpus Christi, hereinafter styled lessor, and L. K. Mason, hereinafter styled lessee, Witnesseth;

1. That the lessor hereby leases unto said lessee that certain portion of the Medical-Professional Building situated in Corpus Christi, Nueces County, Texas, described as follows: Old Elks Building and lot at Starr and Water Streets, Corpus Christi, Texas. Subject to exitsing lease to J. L. Mayes, to be used only as a legitimate business enterprise, for the term of 60 months, beginning on the 1st day of October, A. D. 1944, and ending on the 30th day of September, A. D. 1949, or until this lease is terminated in the manner set out, for the agreed rental stipulated and the observance and performance by lessee of the matters and conditions hereinafter specified.

2. Said lessee promises and agrees to pay to the lessor or to his order, as rental for the premises above described and leased, the sum of $54,000.00 at the rate of $10,800.00 per annum during the terms of this lease, and any holding over thereafter; said rentals payable in advance on the first day of each 6 months period during the term and continuance of this lease, in two semi-annual installments of $5,400.00, at the offices of the lessor in said building, together with interest at the rate of ten per cent (10%) per annum on past due installments until paid, and a reasonable

attorney's fee should the claim for such rent be placed in the hands of an attorney for collection after maturity.

3. Said lessee agrees to prevent waste and take good care of the premises described and leased above, and to comply with all insurance regulations, and not to violate any of the [fol. 480] provisions or restrictions of the fire insurance policies now held or which hereafter may be taken out on said building, so that the lessor will be enabled to keep the building insured; and to fully comply with each and all of the requirements of the Rules of lessor, which are printed on the reverse side of this instrument and made a part thereof, as though set out fully herein, and not to use or allow the use of the premises or any part thereof, for any purpose other than that for which it is rented.

4. Lessee agrees to surrender possession of said leased premises at termination of this lease in as good condition as when received, ordinary wear and tear alone excepted. Any holding over after the termination of this or any renewal of this lease shall be subject to all the other provisions of this lease.

5. In case the building is totally destroyed by fire or other causes, then the lease shall terminate. In case the building is only partially destroyed then the lease shall not terminate if the lessor elects to rebuild, and rents shall abate during such time as the leased premises are not tenantable. Lessor shall have every facility for making the necessary repairs.

6. It is agreed that on the failure of the Lessee to pay any installment of rent when due under the terms of this lease, the lessor shall have the right to terminate or cancel this lease and retake immediate possession of the premises without any notice, and upon such termination or cancellation, the lessee agrees to promptly surrender the leased premises to the lessor.

7. It is agreed that the failure on the part of lessee to keep and strictly perform any agreement, covenant or condition contained in this lease, or in said rules and made a part hereof shall entitle the lessor to cancel this lease and retake immediate possession of the leased premises without any notice, and upon such cancellation lessee agrees to peaceably surrender the leased premises to the lessor. [fol. 481] Upon the termination of this lease, the lessor shall

have the right to eject the lessee or those claiming under him from said premises, and all damages resulting from such termination, ejectments and reentries are hereby expressly waived.

8. The lessee hereby expressly gives the lessor a special lien on all the contents of the leased premises, whether exempt under the law or not, to secure the payment of said rents, due or to become due, which lien is to in no wise to impair or affect the lien given by law, but is to be cumulative to the landlord's lien provided by law, and said lien may be enforced against such contents by sale, as is provided by law for sale of personal property under exemption.

9. Rental payments shall be credited on the first rental due. Inventory attached hereto and made part hereof is to be maintained in first class condition and surrendered at the termination of this lease.

Taxes in excess of 1944 assessment for all tax bodies to be paid by lessee. Fire, hail, tornado and explosion insurance to be paid by lessor.

Elevator and public liability insurance satisfactory to lessor to be paid for by lessee and assigned to lessor.

Witness our signature, this 5th day of September, A. D. 1944.

Signed B. M. Jackson, Lessor; Signed L. K. Mason, Lessee.

(The "Rules of Building" appearing on the reverse of said exhibit, are not copied for this record.)

[fol. 482] Q. Mr. Jackson, I notice that this lease provided for two semi-annual payments of $10,400.00 each?

A. That is right.

Q. Dated 5th of September, 1944, and the term of the lease starts the 1st of October, 1944, that is correct, is it not?

A. Yes sir.

Q. I believe you stated Doc Mason paid the original $5,400.00 semi-annual payment?

A. Yes sir.

Q. Has he paid the second payment?

A. He has.

Q. When was that paid?

A. I believe it was April 1st.

Q. April 1st?

A. I think it was the 1st of April.

Q. When you refused the rental on these premises from Mr. Mayes tendered by Mr. Burchard, had you been advised by Mr. Mason to refuse to accept rentals in event they weren't paid promptly by the 14th of the month?

A. No sir.

Q. Have you ever been advised by Mr. Mason to refuse the rentals?

A. No sir.

Q. You haven't?

A. I haven't.

Q. Whey did you bring this suit?

A. I was advised by counsel.

Q. Then Doc Mason has never advised you to refuse the rentals nor to bring this suit, is that right? Therefore, when this suit was filed the man entitled to have the rentals has never refused to accept them, and has never instructed you to file suit?

A. Read the question.

Q. As far as you know at the time you filed this suit Doc Mason had never refused to accept the rentals?

[fol. 483] A. No, I gave him the check, cash, paid him that and gave the checks and after consultation with the lawyers they sent them back.

Q. Sir?

A. After consultation with our lawyers.

Q. Who turned them back?

A. Our counsel, Mr. Vaughn.

Q. You are speaking of a check?

A. Yes sir.

Q. I am speaking about any conversation with Doc Mason?

A. No, he hasn't told me to refuse to accept them.

Q. And he is the man that you would have turned the rental to?

Mr. Tarlton: We object to that. That is not proper evidence. I think the written contract required the payment of rentals to be made to Mr. Jackson, and the instrument is offered in evidence.

The Court: I believe he went over that once.

Mr. Lewright: No, not this part. Here is the lease contract. He testified, "No, I don't get it." Doc Mason is the man entitled to possession and is the man under their course

of conduct entitled to rentals when paid by Mr. Mayes or accepted.

Mr. Tarlton: Counsel's statements are contradictory of the writings.

The Court: That is your version.

Mr. Lewright: I will see if that is Mr. Jackson's version.

The Court: All right.

Q. When did you start paying Doc Mason?

A. When did I start giving him the rent paid on the building by Mr. Mayes?

Q. Yes sir?

A. November 1, 1944.

Q. And did so up to and including the February 14 pay-
[fol. 484] ment up to March 14th?

A. I believe that is correct.

Q. All right. Now, if the rental payment had been made on March 14, 1945, of $275.00, isn't it a fact that you would have entered it as a credit of Doc Mason's?

A. I would have turned the check over to Mr. Mason.

Q. You would have turned the check over to Mr. Mason. That is the one question I wanted, and Mr. Mason had never advised you to this good day to not accept the rentals?

A. He has not.

Q. You have testified Mr. Mason didn't instruct you to bring this suit?

A. That is right.

Mr. Lewright: That is all.

Mr. Tarlton: Hand me the lease contract. You didn't read—counsel didn't read the contract in evidence to the Court or jury.

The Court: Just a minute, Mr. Tarlton. This contract has no bearing on this case. I don't see why we should——

Mr. Tarlton: If it isn't admitted in evidence we won't admit it.

Mr. Lewright: It was offered and admitted. Why do you say it has no bearing on this case or the issues. Here is the contract that calls for, if it is in effect, and he testified it is in effect, that this suit can only be brought by Doc Mason, and as Mr. Jackson testified this morning, for the use and benefit of the man entitled to the use and benefit of it.

Mr. Tarlton: That is contradictory of the contract, and the Court's ruling it is not in evidence is proper.

Mr. Lewright: Just a minute. Will you permit me to finish?

Mr. Tarlton: I would like to.

[fol. 485] Mr. Lewright: I hadn't finished.

The Court: Go ahead.

Mr. Lewright: Under the terms of the contract L. K. Mason is entitled to possession of the premises subject to the rights of Mr. Mayes, from October 1, 1944, for a period of five years, as long as he has paid the rental. Now, had he paid the rental at the time this suit was filed the plaintiffs could only bring suit for the benefit of the man entitled to possession of it as a matter of law. They had delivered possession to somebody else. They contracted that possession away. It is a cinch they can't take possession for themselves. That is just horse sense, Judge Browning; that contracted possession to somebody else, and if they bring suit for possession they can only bring it for the use and benefit of the man they contracted and delivered possession to, to-wit, Mason. He is the man entitled to possession and for whose use the suit can only be maintained. He has never asked that it be filed, and he has never instructed Jackson to refuse to accept the rental; he testified that if he had collected the March rental he would have delivered it to Mason, and then he testified he paid rentals to him from November to March.

Mr. Tarlton: The Court's original ruling is entirely correct. This contract has no place or bearing in this case and is immaterial and irrelevant. Counsel's statements correctly made of the contract is that Jackson and the other owners of the property who irrespective of the party in possession has a right to maintain this suit, leased to Mason subject to the defendant's existing lease, I think they are the only parties who can bring suit for possession. I think if their contention is sound then they have no lease on this [fol. 486] property, which is exactly the thing we are trying. The lease shows (Reading from the lease) the lease is subject to whatever rights existed here, and here are those sections. That lease in dispute is properly before the Court. We think the Court's ruling is correct that that lease has no effect here, but if the defendants want to interrogate the witness about it——

Mr. Woods: Under the terms of this lease who would be entitled to possession if the defendant Mayes is ousted? It would be L. K. Mason under the terms of this lease. This

lease was made in September that Mason signed. Mayes' lease didn't expire, if at all, until March 14, which they are contending now and with the option of another year from the 14th of March, 1945 to the 14th of March, 1946. Now, this suit would have to be brought in behalf of one or two people. It would have to be brought by Doc Mason or as agent in behalf of Doc Mason. Now, this lease says that it is made subject to the lease of Mayes, and they have collected $10,000.00, $5,000.00 three months before Mayes' lease expired and have been turning the rent over to Mason from November down to February. Therefore, this suit——

The Court: All right. Mr. Woods, this Court is going to take the same position that he took prior, that the contract was signed with Mr. Mayes and Mr. Jackson, that is the contract that we are now trying the suit over. Is that right?

Mr. Tarlton: That is the position.

Mr. Woods: That is what the suit was filed for, Your Honor.

The Court: And the Court is going to hold that any other contract that might enter into, or any other lease agreement that might be entered into was superfluous.

Mr. Lewright: May I ask Your Honor the question?

[fol. 487] The Court: Yes sir.

Mr. Woods: How would we get around the proposition that for four or five months Mason has been getting the rent on the Mayes lease?

Mr. Lewright: And not Mr. Jackson.

The Court: Mr. Jackson, are you collecting this rent and paying it to Mr. Mason or giving him credit for it?

A. I give it to him as credit against what he has already paid.

The Court: You collect it on your lease, is that right?

A. Yes sir.

Mr. Lewright: And pay it to Mason?

A. He is entitled to all of the profits under that lease.

The Court: That agreement still holds?

A. Now?

The Court: I say the agreement that Jackson and Mr. Mason signed——

Mr. Tarlton: That is the only issue on trial here.

The Court: That is the only issue we are trying. We are not trying Mason's lease or agreement with Jackson.

Mr. Lewright: But, Judge, the question is raised here and squarely and can't be disputed that under the testimony of this man this suit is improperly brought. The testimony is undisputed in this case. The only issue before the Court is the right of possession and when Bush Jackson testified here today and when that affidavit was made in the Justice Court, the affidavit is concerning the right of possession, at that time the only man entitled to possession, if Mr. Mayes wasn't, was Mason. Now, here is a man that says Mason never told him to refuse the rent, or further, that Mason never told him to bring suit. The suit falls.

Mr. Tarlton: That is not the Court's ruling and is not the case.

[fol. 488] The Court: The ruling of this Court——

Mr. Lewright: It may not be the Court's ruling I know.

The Court: It is the ruling of the Court only one contract in controversy and that is between Jackson and Mayes.

Mr. Lewright: You refuse to permit us to show they don't own the contract and that is your ruling?

The Court: That is right.

Mr. Lewright: O-kay. Exception.

Mr. Woods: Substitute a copy, Mr. Jackson, and leave that lease from Jackson to Mason in the record.

Mr. Lewright: A copy of it.

Mr. Tarlton: Leave it there in the record.

Mr. Lewright: I understand Your Honor has allowed us to offer that in the record?

The Court: Yes.

Mr. Tarlton: We move to strike it. The Court ruled it is not admissible. If you want a bill on it it is there.

Mr. Lewright: We don't want any bill. All we want is the lease.

Mr. Tarlton: The copy was substituted.

The Court: I have ruled it is not admissible, Mr. Lewright.

Mr. Tarlton: We ask permission to withdraw the copy if he doesn't want it for the bill.

The Court: Permission is granted.

Mr. Lewright: Exception.

Mr. Tarlton: That is all.

Mr. Lewright: That is all.

Mr. Lewright: The defendants rest.

[fol. 489] BARNEY COTT, called as a witness by the Plaintiffs, first having been duly sworn, testified as follows:

Direct examination.

By Mr. Tarlton:

Q. What is your name, please?
A. Barney Cott.
Q. Mr. Cott, do you know Mr. Burchard, the defendant in this case?
A. Yes.
Q. Has he been employed by you?
A. Yes sir.
Q. Have you at any time removed him from that employment?
A. No sir.
Q. Is he still employed by you?
A. Yes sir.
Q. When was the last work he did for you?
A. Yesterday.
Q. Did you at any time advise him that if he didn't leave this suit alone that you would withdraw your account from him?
A. No sir.
Q. Did Doc Mason ever make any request of you to use your influence and get him to dismiss or withdraw from this case?
A. No sir.

Mr. Tarlton: I believe that is all.

Cross examination.

By Mr. Lewright:

Q. What business are you in, Mr. Cott?
A. I am in the soft drink business.
Q. What is the drink you handle?
A. Pepsi-Cola.
Q. You have the agency in Nueces County?
A. No, I have eleven counties.
[fol. 490] Q. How long have you been in Nueces County?
A. Not quite five years.
Q. Where are you from?
A. New York.

Q. New York. How long have you known Doc Mason?

A. I have known of him, I didn't know him personally.

Q. How long have you known him personally?

A. I just met him out here in the hall.

Q. And meeting him in the hall is the first time you have ever known him?

A. To be introduced to him, but I have heard of him but never known who he was; never spoken to him.

Q. Had you ever spoken to him since you have been in Corpus Christi before today?

A. Yes, I spoke to him once on the telephone three years ago when he owned the Dragon Grill.

Q. Do you know any people associated with him in the conduct of his business?

A. No sir, I don't.

Q. Do you sell him or anybody connected with him any of your products?

A. Not that I know of.

Q. Does he have any place of business operating now to your knowledge?

A. Not to my knowledge.

Q. You don't know whether he has any place in Nueces County operating or not?

A. I couldn't tell you. I don't know.

Q. Do you sell any place of business in Corpus Christi with which to your personal knowledge Mr. Mason is or is not connected?

A. I couldn't tell you that. I wouldn't know.

Q. Have you ever received any check or draft or payment of money from Doc Mason in the last three years?

A. No sir, I don't remember it.

[fol. 491] Q. Have you ever received any check or draft or any payment of money through any other person for his account or for the account of any business of his?

A. Our busines is transacted strictly as a cash business. We don't run any accounts and I wouldn't know.

Q. Now you told the jury you never at any time had a conversation with this man Burchard relative to the fact of telling him if he didn't cease to prosecute this suit or in which you indicated he had better cease to prosecute this suit?

A. I did which?

Q. Did you have any conversation with Mr. Burchard or have you had any conversation with him about this suit since it was filed?

A. I had some conversation with him about two weeks ago.

Q. All right.

A. About the delinquent condition of my accounts.

Q. Did you have any conversation with him regarding this suit, the prosecution of this suit?

A. No sir, I didn't.

Q. Did you mention this suit in that conversation?

A. No sir, I didn't.

Q. Wasn't mentioned at any time?

A. No sir.

Q. Or under any circumstances?

A. Under any circumstances.

Q. You deny you had any conversation in which you told him he had better cease prosecution of this suit?

A. Yes sir.

Q. Now, do you know Mr. Leidecker?

A. Yes sir.

Q. How long have you known him?

A. About four years I should say.

Q. Have you had any conversation with Leidecker about or concerning the prosecution of this suit by Mr. Burchard?

[fol. 492] A. No sir.

Q. Do you sell any places of business in which Leidecker is interested, directly or indirectly, to your knowledge?

A. I wouldn't know.

Q. Do you know whether Mr. Leidecker is or is not a partner of Doc Mason's?

A. No sir.

Q. You have never heard that before?

A. No sir.

Mr. Lewright: I see. That is all, I believe.

Mr. Tarlton: That is all, Mr. Cott.

[fol. 493] L. K. Mason, called as a witness by the Plaintiffs, first having been duly sworn, testified as follows:

Direct examination.

By Mr. Tarlton:

Q. What is your name, please?
A. L. K. Mason.
Q. Where do you live, Mr. Mason?
A. I live at 3937 Live Oak Street.
Q. How long have you lived in Corpus Christi?
A. Going on 18 years.
Q. Did you have any conversation with Mr. Burchard here in regard to Mr. Mayes' occupancy or continuing his occupancy of the ground floor of the old Elks building?
A. Yes sir.
Q. What conversation did you have with him and when did it occur?
A. My first conversation with Mr. Burchard was around the last of February, and I went to his office and I told him that I had gotten possession of the building, and he said, "Well, we would like to stay in," and I said, "No, we have to have the use of it." He says, "If that is the case I will move." So the next conversation he told me he was going to move.
Q. When was that?
A. I would say that was around the 16th, somewhere in that neighborhood, of March. Then the next conversation, I was up to Mr. Vaughn's office and Mr. Burchard told me that Mr. Mayes' copy of the contract, he had been out trying to get hold of it, and we had been trying to get hold of him and he called Mr. Vaughn's office. So I called Mr. Burchard, and he said, "Well, you come on down here. No, we will come up there." So when he came up there Mr. Vaughn gave him a copy of the lease and me and him went back down together, and the other conversation was out here in the hall this evening.
[fol. 494] Q. Did he stop and voluntarily shake hands with you this evening?
A. He did. He said, "How are you, Doc?"
Q. At Mr. Vaughn's office did he tender an additional $25.00 rent?
A. No sir. He told Mr. Vaughn he didn't feel he should undertake it. He told him he would just mail it to the office.

Q. In that conversation do you recall whether he mentioned that he would have to confer or not with Mr. Mayes before he determined whether he wanted to keep the building?

A. He said that he expected a call from Mr. Mayes and later he told me that he didn't get the call but that Mr. Mayes had talked to Mr. LeGrand Woods.

Mr. Tarlton: That is all.

Mr. Lewright: Mr. Mason——

Mr. Tarlton: Just pardon me, there are some other questions.

Q. Mr. Mason, did you at any time by telephone call Mr. Burchard and tell him if he didn't leave this case you would ruin him and he would have to leave town?

A. No sir, I didn't.

Q. Did you in person or by telephone or otherwise make such threats to him?

A. No sir, I didn't.

Q. Have you talked to him on the telephone?

A. I have talked to him at least two or three times on the telephone.

Q. When was the last conversation, was it prior or subsequent to the other trial of this case?

A. It was before the other trial of this case.

Q. Before the other trial?

A. No sir.

Q. Did you at any time, at any place or any kind of communication offer any threat or distruction to his business or to run him out of town if he didn't withdraw from this suit? Did you ever make any such statement? [fol. 495] A. No sir.

The Court: Just a minute. It is the opinion of this Court, I ruled before that any contract that Mr. Jackson and Mr. Mason had had no part in this court or in this trial. I am going to call Mr. Burchard back to the witness stand after you excuse Mr. Mason unless you can show that there is some part, in so far as Mayes and Mr. Mason is concerned I think his testimony would be irrelevant and immaterial. Counsel for the defendant has not made that objection, that is true, but I am of the opinion that Mr. Mason hasn't any right to testify any further than actually what happened between Mayes and Jackson.

Mr. Tarlton: Your Honor, I think your ruling is correct, with this observation: Mr. Burchard has come and testified that this man has offered threats to him on the telephone and I desire to prove, that is contradictory of the testimony of Mr. Burchard.

The Court: All right, You can question him on that, but no questions on any contracts.

Mr. Tarlton: Oh, no. I had no idea of asking him with reference to any contracts.

The Court: All right. Go ahead.

Mr. Tarlton: I think the Court's ruling the only consideration is the contract between Jackson and Mayes dated March 14, 1944, is correct.

The Court: All right. Let's go.

Mr. Tarlton: I will begin over and ask the questions.

Q. Did you at any time, anywhere, any place, under any condition, by telephone or otherwise, threaten Mr. Burchard if he didn't abandon this suit and withdraw from it you would ruin his business and run him out of town?

A. No sir.

Q. Did you arrange with any one else to make any such threats to him?

[fol. 496] A. No sir.

Mr. Tarlton: That is all.

Cross-examination.

By Mr. Lewright:

Q. What is your business, Mr. Mason?

A. Temporarily I am in real estate.

Q. That is real estate brokerage business?

A. No sir, rental property.

Q. Rental property?

A. Yes sir.

Q. Are you interested in any restaurants or places of business in Corpus Christi or Nueces County?

A. No sir.

Q. Are you in partnership with Leidecker in any projects in Corpus Christi or Nueces County?

A. Yes sir, I own 25 per cent interest in the C. C. Novelty Company in which I don't take any part.

Q. What is the C. C. Novelty Company?

A. They have cigarette machines, phonographs——

Q. Marble tables?

A. Yes sir.

Q. Slot machines?

A. Have none in operation.

Q. But you own quite a number and not operating right now?

A. Well, we haven't, I don't think, operated slot machines five or six years.

Q. Are you operating any marble tables now?

A. They are set without the pay-off.

Q. I say you are operating them?

A. Yes sir, without pay-off.

Q. Are you interested in any other business with him outside of the C. C. Novelty Company?

A. Some property.

[fol. 497] Q. Operating any other establishments of any kind?

A. No sir.

Q. You formerly ran and operated the Dragon Grill?

A. Yes sir.

Q. Do you know Mr. Barney Cott?

A. I never seen Mr. Cott I know of until about two minutes before he came in out there in the hall.

Q. You had never met him before?

A. No sir.

Q. Buy any of his products?

A. I don't know what kind he sells. Never bought any from him in my life.

Q. Buy any Pepsi-Cola while operating the Dragon Grill?

A. Never did.

Q. So you had no business transactions with him?

A. No sir.

Q. Did you hold some kind of conversation with Mr. Burchard on the telephone after the last trial of this case in the Justice Court?

A. No sir.

Q. You say you haven't telephoned him any time since that Justice Court case was tried?

A. That is right.

Q. You are positive of that?

A. Certainly.

Q. If some one called and said it was Doc Mason it wasn't you?

A. If they did, I didn't call him.

Q. You don't know whether they did or not?

A. Not to my knowledge; nobody called him I know of.

Q. From November, 1944, to and including March, did Mr. Jackson turn over the rentals of Mayes' lease to you?

A. He collected them for me.

Q. Acting as your agent?

A. Yes sir.

[fol. 498] Q. And continued to do that up to the time that this controversy arose?

A. Probably, possibly a month or two before this arose, somewhere in that neighborhood.

Q. On or about March 19 or March 21 had you instructed Mr. Jackson to refuse to accept rentals from the defendants in this case?

A. Did I refuse to accept any rentals?

Q. Had you instructed him not to accept rentals?

A. I told him not to take any if it wasn't properly due.

Q. Not to take any?

A. Yes sir.

Q. Did he consult with you before he brought this suit?

A. Yes sir.

Q. Were you informed the law suit was going to be filed?

A. The law suit, we didn't talk about the law suit until they failed to send the right amount of check in and Mr. Burchard came and said he refused to take the check back, have to mail it to him, have to get hold of Mr. Mayes.

Q. That is when you instructed——

The Court: What was the question and answer?

Mr. Lewright: Your Honor understand that——

(Question and answer read by the Court Reporter.)

Q. As I understand it up to the time that Mr. Burchard refused to take the $250.00 check you hadn't instructed Mr. Jackson to file the suit and you had that conversation and Mr. Burchard wouldn't take the check back and Mr. Vaughn was going to mail it, that is when you instructed Mr. Jackson to file suit?

A. That is when he sent the check for $250.00 after Mr. Burchard——

Q. That is when you instructed Mr. Jackson to file this suit?

A. I would say possibly three or four days.

Q. Before Mr. Jackson filed suit you had instructed him to do so?

A. I told him I didn't want it and I wouldn't accept it that way.

Q. And did you tell him to file this suit?

[fol. 499] A. Yes sir.

Q. All right. Then your testimony is that before March 19th or March 21st, 1945, you had told Bush Jackson not to accept any of the rentals, and according to your testimony before the suit was brought you instructed Mr. Jackson to bring it?

A. To bring what?

Q. Bring this suit?

A. No sir, not until after the check came in.

Q. Before the suit was brought you told Mr. Jackson to bring it?

A. Before, yes sir.

Q. Then, if Mr. Jackson says you didn't, one of the two is not telling the truth?

A. I guess that is right.

Mr. Lewright: That is all.

Redirect examination.

By Mr. Tarlton:

Q. Mr. Mason, after that conversation with Mr. Vaughn and Mr. Burchard, Mr. Burchard told you that he would have to consult with Mr. Mayes, I believe that is your testimony?

A. That is right.

Q. And asked that the check be mailed to him, that is when you determined that suit should be brought, that is correct?

A. That is right.

Q. Isn't it a fact after that was done that Fred Flato and yourself, you came to my office and they and you employed me to bring this suit?

Mr. Woods: This is his witness and he is leading. We didn't put him on the stand. Every question asked in the last few minutes is leading. We ask the Court to instruct him not to lead the witness.

Mr. Tarlton: That is all right.
The Court: What was the question?

(Question was read by the Court Reporter.)

[fol. 500] Mr. Tarlton: What is the answer to that question?
The Court: You are claiming that question is leading?
Mr. Lewright: Leading and suggesting.
The Court: All right. Reframe your question.
Mr. Tarlton: Been no motion to strike it.
The Court: Strike the question.
Mr. Tarlton: Sir?
The Court: Strike the question.
Mr. Tarlton: All right.

Q. After you determined that a suit would be brought what did you do, Mr. Mason?
A. After the suit was brought?
Q. No, after you determined that you had a right to bring the suit, what did you do?
A. Well, we, I think, had Mr. Vaughn to send the check back, and then Mr. Flato was at your office and proceeded with the suit.
Q. Who came with you to my office to see about bringing suit?
A. Mr. Flato and Mr. Jackson.

Mr. Tarlton: That is all.
Mr. Lewright: That is all.

Testimony closed.

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[fol. 501] The State of Texas
County of Nueces

I, B. E. Alexander, an Official Shorthand Reporter, at present holding the position of Official Shorthand Reporter of the 94th District Court of Nueces County, Texas, do hereby certify that I reported in shorthand the oral testimony, objections, replies and rulings in the above entitled and numbered cause, and I further certify that the above and foregoing pages of typewritten matter contain a full, true and correct transcript in Question and Answer Form of my shorthand notes made at the time such testimony was

heard together with a full, true and correct transcript of the documentary evidence introduced.

Witness my hand, this the 9th day of June, A. D. 1945.

(Signed) B. E. Alexander, Official Shorthand Reporter.

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[fol. 502] EXHIBIT C-26

From the Corpus Christi Caller, May 26, 1945

Playboy Cafe Ouster Suit Opens

The suit of Bush M. Jackson against Pvt. Joe L. Mayes to determine occupancy of the ground floor of the old Elks Club building at the corner of Starr and Water Streets, operated as the Playboy Cafe, opened yesterday afternoon before Judge Joe E. Browning in County Court.

The suit had earlier been heard in Justice of the Peace Carl Crow's court as a forcible detainer suit in which Jackson had sought to obtain an order against Mayes, now a soldier stationed at Camp Hood, Texas, ordering him to vacate the premises. Crow found for the plaintiff, but Mayes, through his agent, F. F. Burchard, filed an immediate appeal.

Burchard testified that he had had no knowledge of a clause in the option which called for an increase of $25 monthly in the $250 per month rent. He said that in March he sent a check for the regular monthly amount of $250 to the plaintiff and notified him that he intended to take advantage of his option for another year of possession of the premises, which is operated by Mayes as the Playboy Cafe.

Burchard further claimed that although he had not known of the option clause, when he had learned of it he had immediately proffered a check for $275 rental. This check, as in the case of the one for $250, was refused by the plaintiff, who asked possession of the premises.

Private Mayes, who preceded Burchard to the witness stand, asserted that he had not known of the non-payment of the extra $25 until notified by citation to appear in court.

Burchard said that he had not seen the contract on the property under question until in March. He said that he had tried every means possible to get a copy of the lease

[fol. 503] but had failed. He said that in a conversation with Doc Mason, former owner of Dragon Grill, Mason had told him that he had bought the building and had asked what he, Burchard was going to do.

Burchard said that he had informed Mason that he would live up to the terms of the contract, which were, it was stated, that Mayes' contract would terminate if the building were sold by March 1 of this year.

Following Burchard's testimony Judge Browning recessed the trial until 9 o'clock this morning.

Mayes, who was inducted into the Army last Jan. 17, is in Corpus Christi on special 4-day furlough to appear in the court.

Walter M. Lewright and LeGrand J. Woods are counsel for defense and Dudley Tarlton and Walter Koch are counsel for defense.

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[fol. 504] EXHIBIT T-26

From the Corpus Christi Times, May 26, 1945

Testimony Gets Underway in Ouster Suit

Mayes' Agent Says He was Told Building Sold

Floyd F. Burchard, who operated the Playboy Cafe for Pvt. Joe L. Mayes of Camp Hood after he went into the Army, last February, testified in County Court today that Lynn K. (Doc) Mason had approached him many times since last December claiming to have purchased the Old Elks Club at Starr and Water Streets where the Playboy is located.

Burchard, an accountant, said that Mason onetime owner of the Dragon Grill, had not in fact made the purchase. It was his understanding, Burchard said, that if the building were sold, the Playboy would be required to move out.

This testimony was adduced before Judge Joe D. Browning and a jury before whom trial is in its second day on ouster proceedings whereby Bush M. Jackson, building agent, seeks to obtain possession of the first floor from Mayes.

*Learn of Provision*

While Mayes did not go into the Army until a few months ago, Burchard testified he had held power of attorney to act for the Army private since May 22, 1944.

He said he had never been permitted to see a copy of the lease contract between Jackson and Mayes until after March 14, this year. This, he said, was after he had mailed a check to Jackson for $250 monthly rental and later learned that the option affixed to the lease required a $25 monthly increase after March 14.

The first time he saw the lease was on March 19, when he went to Jackson's attorney, Benjamin F. Vaughn in company with Mason he declared. At that time Burchard said, he offered to pay the difference and his offer was refused.

[fol. 505] *Says Rental Offered*

"Mr. Vaughn told me they did not want to accept the money—that they wanted the building instead," Burchard testified.

Walter M. Lewright, defense counsel, attempted to introduce a carbon copy of the lease to prove that it had been altered while in Jackson's possession without the consent of the parties, but was overruled by Browning.

Burchard also testified that he offered Walter Koch, Jackson's attorney, two months' rental in Justice of the Peace Court, on May 2, and that Koch turned to Jackson and asked him whether he wished to accept.

Jackson refused, he said. The auditor has since deposited $825 in the registry of the court to the account of the plaintiff, he declared as evidence of his readiness and willingness to continue the lease under terms of the option calling for $275 monthly.

*Attorneys Clash*

The trial moved slowly through the morning today as Lewright and Dudley Tarlton, counsel for Jackson, engaged in frequent legal clashes.

At one point, both lawyers were pouring acid at one another when the court interrupted to suggest that they proceed with the evidence.

The legal disputing began when Tarlton tried to impeach Burchard's testimony and to raise doubt as to the credibility

of his statements by reading clauses from a 1943 lease agreement. Lewright objected and after a 10-minute skirmish, was sustained.

Again Lewright objected to what he terms "repetitious cross examination of the witness by Mr. Tarlton—all of this was gone into yesterday."

Tarlton accused Lewright of causing the delay by his frequent interruptions. He also protested that Lewright was testifying for the witness in the phraseology of his objections.

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[fol. 506] EXHIBIT C-T-27

From the Corpus Christi Caller-Times, May 27, 1945

Jury Defies Order by Browning for Directed Verdict

A jury with a conscience last night refused to find a verdict in accordance with instruction handed down by Judge Joe D. Browning in County Court at 7 p. m., concluding a trial that began Friday afternoon.

Twice after receiving the court's instruction ordering the six men to sign a prepared verdict, typed in Browning's office, the men returned the copy altered so that the verdict was in favor of the opposite party in the suit.

Browning's instructions were that the jury find for Bush M. Jackson, agent of the Old Elks Club at Starr and Water Streets, who had sued Joe L. Mayes, an Army private now stationed at Camp Hood, to oust Mayes from his place of business known as the Playboy Cafe.

As Browning the second time ordered the jury back, A. B. Kirk, foreman, halted on the way from the box and asked him:

*Foreman's Question*

"When we have a unanimous vote, do we have to go by the instructions against our conscience? We of the jury swore to listen to the evidence and find according to our conscience."

Jurors, other than Kirk, are I. Hram, W. G. Douglass, William A. Owen, Irwin B. Meyers, and H. G. Wernette.

At 7 p. m., Browning, without listening to argument from counsel for either side on a plaintiff motion, presented by

Dudley Tarlton for Jackson, and without giving the six-man jury opportunity to weigh the evidence, instructed the jury to find against Mayes.

Walter M. Lewright, Mayes' attorney, protested that the court's arbitrary action had ruled that Tarlton's "one-page motion" did not need supporting argument and citation of authorities.

"Your honor announced that it was his intention to grant the plaintiff's motion for an instructed verdict. I trust that [fol. 507] you will change your mind on this announcement."

*Attorney's Demand*

Browning attempted to interrupt Lewright, but the attorney brushed him aside.

"Just a minute; just a minute," he answered, "We feel that this matter should go before the jury. We want this to go before the jury as a matter of justice and we urge that you reconsider your announced intention."

Disregarding Lewright's appeal, Browning left the bench and, seated at the clerk's desk before the jury box, read the order for an instructed verdict.

The jury went out in custody of the bailiff and the minutes ticked by. Twenty minutes later the men came in and handed their first finding to Browning. The prepared document had been altered in ink. Browning read in silence.

"Will your honor kindly read the verdict?" asked Lewright.

"They've written in . . . 'In favor of the defendant against the plaintiff'," said Browning and when Lewright asked again that he read the verdict in its entirety, Browning read. He turned to the jury.

"Gentlemen of the jury, you've been instructed to find for the plaintiff," he stated.

*'We'll Just Keep Jury'*

Turning to the clerk he ordered that the form be "reframed," and observed: "We'll just keep the jury here until they sign it properly."

The jury went out again without comment, returning again at 7:45 p. m., Lewright again asking that the court read the verdict. This time, the reading showed the jury had inserted these words; "We unanimously find for the defendant against the plaintiff."

Tarlton and Browning joined in commenting on the alleged irregularity of the jury's verdict, Tarlton declaring: [fol. 508] "The jury should be instructed that the verdict is a verdict of law and not a finding from the evidence."

"I object to the jury being coerced in this manner," declared Lewright. "The matter has been submitted once and twice, and the jury has returned its verdict. I think it highly improper to attempt to coerce the jury."

Browning ordered the men out again and as they were leaving, Kirk halted to propound his questions to Browning concerning the extent of a juror's obligation to be bound by his conscience.

*'Why Have a Jury?'*

"Why call on a jury if we can't make up our own minds," concluded Kirk. He was joined by a second juror who asserted: "We intend to give a fair and just decision."

"A jury doesn't have to stultify its conscience," retorted Lewright, when Browning insisted that the jury find as instructed.

"You go on up there, and if you don't sign," ordered Browning, "you just stay up there until you make up your mind to sign it."

At 8:19 p. m., Browning called the jury back and handed over a written opinion informing the men that they were bound to conform with the court's direction.

The men went back without comment.

*Session Today*

Ten minutes later, Browning asked for the time, and at 8:57 p. m., he called the jurors in again to inform them that if they were unready to reach a verdict, the court would convene at 9 a. m.

The jurors went out for dinner with the bailiff and at 9:43 p. m., returned and went to bed in the jury room on the fourth floor of the courthouse.

The court and jury had been listening since Friday afternoon to testimony concerning Mayes' lease to the Playboy Cafe at Starr and Water Street—evidence that was at times [fol. 509] sensational in its undertones and its implications.

Tales of threats to the person and property of at least one witness were heard and denied; stories of underworld activities involving allegations of gambling rackets were

unfolded and to such an extent that the issues in the case were frequently obscured by the revelations.

*The Issue*

The issue at stake, reduced to the essence, was merely whether Mayes, a private in the Army stationed at Camp Hood, had the right to continue his occupancy of the Playboy Cafe for a year following March 15, 1945, on the strength of an option clause in his lease which expired on that date.

Testimony was that Floyd F. Burchard, an accountant, had acted as his agent from the time Mayes was drafted on Jan. 17, and that Burchard on March 14 tendered Jackson a check for $250.

The option clause gave Mayes the right to continue at the location for another year at a monthly rental of $275, but Burchard said he had never seen a copy of the lease and was unaware of its provision for a rental increase.

He had offered to pay the difference on March 19, when this was called to his attention at the office of Benjamin F. Vaughn, Jr., an attorney representing the owners of the building but his offer was refused.

Burchard, chief defense witness, was on the stand during a good part of the day yesterday and, brought in during the afternoon to open the defense, asserted his life and his business had been obliquely threatened in statements of persons who approached him urging him not to fight the case.

*Five Year Lease*

It was adduced during the hearing that Lynn K. Mason—"Doc" Mason to most residents of Corpus Christi—had obtained a five-year lease to the entire building last October, [fol. 510] the lease providing for payment of $10,800 annually, and made subject to prior rights of Mayes to the Playboy on the first floor.

Burchard then testified that Mason had telephoned him after the legal action was instituted and warned him to drop the defense.

"He said he would run me out of town for attempting to interfere with his business," testified Burchard, who said he knew Mason's voice over the telephone. "He told me I had better not try to interest the grand jury in gambling in this county."

The witness also declared that pressure was being brought to bear on his clients for whom he had been a long time doing accounting and income tax work, naming Barney Cott, operator of a bottling plant; Jack Kins, a wholesale beer distributor; and officers of Temple Beth El among those who, he said, had received warnings. These three corporations were numbered among his clients, Burchard said.

"Barney Cott called me up," he continued. "I've been his accountant ever since he started business here. He called me and said Mason and his partner had called him and said unless I was pulled off the case he could not sell his products in any place Mason and his partner controlled, and that they had some of the best spots in town."

*Objection Overruled*

Dudley Tarleton, counsel for the plaintiff attempted to interpose an objection, but Browning held that the court was interested in the testimony and wanted to hear it.

"Cott said to me," went on Burchard, " 'you're smart enough to know you can't buck Doc Mason. If you try to start anything on gambling here, it'll be the same as in San Antonio where a man was shot and there's been no arrest.' "

Cott subsequently was produced by the plaintiffs in rebuttal and flatly denied all the statements attributed to him [fol. 511] by Burchard. He said he had not discharged Burchard as his accountant, had not warned him to drop the case and had not been influenced by Mason to speak to Burchard.

*Never Met Mason*

Under cross examination by Walter M. Lewright, defense counsel, Cott said he had never met Mason until a few minutes before he took the stand, and that he did not know any of his associates, although he admitted he had sold his merchandise to the Dragon Grill.

"Do you know Mr. Leidesker?" asked Lewright.

"Yes."

"How long have you known him?"

"About four years."

"Have you had any conversations with Mr. Leidecker about this case?"

"No."

"Do you sell any of Leidecker's places?"

"I wouldn't know."

"Is Leidecker a partner of Doc Mason?"

"I wouldn't know."

Lewright let the witness go and Tarlton placed Mason on the stand, who testified he had lived in Corpus Christi for about 18 years and had formerly operated the Dragon Grill and had leased the Old Elks Club from Jackson, and that in February had told Burchard he had acquired the property.

*Mason Examined.*

Browning interfered with the direct testimony of Mason to rule that he did not want to hear evidence from him concerning any contract he might have with Jackson, and the defense took the witness in cross examination.

"What is your business?" asked Lewright.

"Well, temporarily I've got real estate," replied Mason. [fol. 512] "You mean real estate brokerage?"

"No, I've got rental properties."

"Do you own any restaurants in Corpus Christi?"

"No sir."

"Are you interested in any business with Morris Leidecker?"

"Well, I have a 25 per cent interest in the Corpus Christi Novelty Co., but I don't take active part in running it."

"What is the nature of that business?"

"Well, cigarette machines, phonograph machines—various other kinds of machines."

"Like marble tables?"

"Yes."

"And slot machines?"

"Slot machines? No, I don't think they've had any slot machines for eight years."

*Marble tables*

"And you operate marble tables, though?"

"Free play. No pay-off."

"Do you know Barney Cott?"

"No sir. I never met him until now out in the hall."

"Do you know any of his products?"

"I don't even know what he sells."

"Have you had any conversations with Burchard since this case was filed in Justice Court?"

"No sir."

"Did Jackson turn over the rentals of the Playboy to you after you obtained the lease of the Old Elks Club?"

"Yes, he collected them for me."

"Up to March 21, had you instructed him not to accept any rentals on the Playboy?"

"I told him not to take any."

"Did you consult with him over this lawsuit?"

[fol. 513] "Yes sir."

"Then you knew this lawsuit was going to be filed. Did you tell Jackson to file this suit?"

"Yes sir."

"Then if Jackson says you did not tell him to file this suit, one of you is not telling the truth?"

The witness hesitated as Tarlton interposed an objection, and Lewright repeated the question.

Mason finally answered: "I guess that's a fact."

*Jackson's Denial*

Earlier in the trial, Jackson had denied discussing the suit with Mason. He also flatly stated that he had not been told by Mason—to whom he had been delivering the rental of the Playboy—either to refuse the rentals or to bring the lawsuit against Mayes for possession of the premises.

"Then, as far as you know," asked Lewright, "Doc Mason had no knowledge of this suit at the time it was filed?"

"That's right," said Jackson.

While he was on the stand in the early afternoon, Burchard was asked by Browning to tell what he knew of gambling in Nueces County.

"This court would like to know a little more about why you did not go to the grand jury," said Browning.

Burchard said he did go to DeWitt McGee, foreman of the current grand jury after it had completed its April term deliberations and asked him to accompany him in an audience with Criminal District Judge George C. Westervelt concerning the operation of illegal gambling games, policy rackets, poker games, dice games, slot machines and drawings.

*Couldn't Make a Date*

"He said he would go," he continued, "but we never did [fol. 514] because we never were able to make contact with one another."

Burchard said he knew Doc Mason was operating marble tables through his investigation of federal stamp licenses issued, but he admitted when pressed for the facts that his knowledge of other "rackets" was chiefly hearsay. He stated, however, that he had "gone to Austin" to complain against Doc Mason.

Lewright, who was joined by Lerand J. Woods in the defense, had presented a motion for an instructed verdict to Browning when the plaintiff rested, but Browning declined to rule on it until after the defense testimony was presented.

The defense counsel argued for close to 90 minutes citing, cases after case from the precedents established in the state courts to bolster his argument that the plaintiff was not entitled to judgment for possession of the premises.

*Heated Sessions*

The case was one of the most bitterly fought in the history of the county, the attorneys involved frequently breaking forth in debates shot through with biting sarcasms and caustic critical observations.

It was regarded a significant part of the defense testimony that both Mayes and Burchard on the stand declared they had no prior knowledge of the Mason lease granted for $10,800 annually by Jackson, last October.

Jackson, Mayes testified, told him at various times between October and December, last year, that he was dealing with K. Wolens on the prospect of leasing that firm the entire premises, and finally told him in December, that the "deal had fallen through."

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[fol. 515] EXHIBIT C-28

*From the Corpus Christi Caller, May 28, 1945*

Jurymen Yield to Judge After 15 Hours Defiance

Assert Verdict Rendered Under Compulsion

A six-man jury, after defying Judge Joe D. Browning for 15 hours in County Court, Saturday night and yester-

day, finally returned a verdict as instructed by the court—but with an appended statement asserting the verdict was rendered under compulsion and against their conscience.

The verdict gave victory to Bush M. Jackson, agent for the Old Elks Club at Starr and Water Streets, in his ouster proceedings to evict Pvt. Joe L. Mayes, now of Camp Hood, from his place of business, the Playboy Cafe.

It was reached at 9:45 o'clock yesterday morning only after Browning had threatened to lock the jury up until 9 a. m. Monday, and after Walter M. Lewright, counsel for the defendant, had addressed the jurors urging them not to continue to suffer for a cause that was lost.

*'Needless to Suffer Further'*

"It's been a pleasure to meet six men of the courage and integrity of you men," he asserted, "But I want to repeat that the court can compel you to sign and it is needless for you to suffer further in this case.

"I assure you a motion for a new trial will be presented, since there is no appeal from this court on a forcible detainer suit. If his honor is in error, as I believe he is, it's an error that God alone can cure."

The jurors were: A. D. Kirk, Bonner Drive, Gardendale, foreman; H. G. Wernette, 2829 Lawnview Street; I Hvam, 200 Fannin Street; W. A. Owen, 1012 Mary Street; W. E. Douglass, 329 Louisiana Street; and Irvin B. Meyers, Route 1, Box 186-B, Gardendale Addition.

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[fol. 516] EXHIBIT C-28

Testimony in the trial showed that Lynn K. (Doc) Mason had paid Jackson $5,400 last October after negotiation with Jackson for a five-year lease of the entire building at the rate of $12,800 annually.

*Ground Floor Leased*

Mayes held a lease to the ground floor running to March 15, this year, and carrying an option for renewal for one year at an increase of from $250 to $275 monthly rental. He went into the Army on Jan. 17.

From that time on, Floyd F. Burchard, an accountant, had been handling Mayes' business affairs. Undisputed

testimony showed he mailed the customary check for $250 rental on March 14 which the owner rejected. Burchard said he never knew of the lease provision for an increase of rental to $275 until after this rejection. The owners refused the balance, he said.

At the close of testimony, Saturday night, Dudley Tarlton presented a motion for a directed verdict for the plaintiff. Lewright had presented a similar motion for the defendant earlier in the day on which argument continued for an hour and a half.

Browning accepted Tarlton's one-page motion and, without permitting argument or citation of authorities to support the motion, ruled that it be granted. The effect of this ruling was that Browning took the matter from the jury.

The jury was directed at 7 p. m., therefore, to sign a document, prepared in Browning's office, which affirmed a verdict for Tarlton's client. Twice, the jurors returned with a verdict for the defendant, unanimously reached on its first ballot.

*Kirk, Wernette Protest*

When Browning insisted a third time and confirmed his order in writing that the jury find as he had directed, Kirk, and Wernette protested that they were being asked to find [fol. 517] against their conscience and against what they believed to be the weight of the law and of the evidence.

No member of the jury is a lawyer. Neither is Browning, who holds office as county judge by popular election, last year. Browning, however, ordered the jury locked up until yesterday morning.

When the jury returned at 10 a. m., yesterday, after being out since 7 p. m., Saturday and during which time they rejected Judge Browning's prepared form finding for the plaintiff, they handed the clerk the third form to be so returned.

This was read to the court with the statement attached and made a part of the verdict in which was written in:

"It — to be understood that this verdict is rendered and recorded with the order of the court against the conscience of this jury."

*Wants Statement Deleted*

Dudley Tarlton, counsel for the plaintiff, leaped to his feet with a motion that the court strike the appended state-

ment of the jury, to which immediate objection was voiced by Walter M. Lewright, defense counsel.

Browning pored over the form at the bench and in the interlude, Kirk arose and addressed Lewright, sitting nearest him.

"Is it proper for me to speak?" asked Kirk.

"Yes sir, Mr. Kirk," responded Lewright.

Browning looked up from the bench.

"Just a minute," he called to Lewright. "Are you the judge of this court?"

"This man addressed me," answered Lewright.

Lewright and Tarlton wrangled momentarily before Browning permitted Kirk to speak again.

The foreman stated: "This jury, on a secret poll, has [fol. 518] reached a unanimous verdict which it will hold to unless that statement is added to the instructed verdict."

*Debate Halted*

This statement halted debate on Tarlton's motion while he again examined the document returned by the jury.

"May I ask the court a question?" said Lewright.

"No," replied Browning.

"I may not ask a question?" repeated Lewright.

"Not unless you can agree on it," rejoined Browning.

Tarlton, meanwhile, had perused and handed back the jury's verdict and observed to Browning:

"This appended statement in writing is not a part of the verdict. The writing is not above the signature of the foreman."

"That's all right. It's on there," said Lewright; then to Browning: "If your honor is going to strike that, we ask that the jury be polled."

"I'll withdraw my motion to strike," Tarlton announced.

Browning took the paper, glanced at it and turned to the jury:

"Gentlemen of the jury, is this the verdict of each and everyone of you——."

Lewright interrupted him.

*Individual Poll Insisted on*

"Now, if your Honor is going to poll the jury, we are going to insist that you poll the members individually, according to the rule."

Browning halted and blinked at Lewright.

"I think the defense is right," he said.

"I'm glad your honor has found me right once," replied Lewright. Tarlton stated he believed also that Lewright was quoting the rule correctly.

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[fol. 519] EXHIBIT C-28

"It's the opinion of this court this jury won't be polled," concluded Browning. "Gentlemen of the jury, you're excused and I thank you for your services here."

The jurors filed out. The trial was closed.

At 9 a. m., Browning convened the session, summoning the jurors from the jury room where they had spent the night. He asked them whether they had signed the prepared verdict for the plaintiff as he had ordered them to do on three occasions, orally, the previous night, and once in writing.

Kirk, jury foreman, said the jury had not signed the verdict.

Browning then told them to return to the jury room, stating that he would be back in open court to hear from them at 9 o'clock, Monday morning. Lewright then got up to address the jury.

*Attorney Grateful*

"Gentlemen, in behalf of Mr. Mayes, as well as in my own behalf and for Mr. Woods and Mr. Burchard, I wish to thank you for what you have done in this case. It is a pleasure and a privilege for me to have made the acquaintance of six men who have displayed the courage and the moral stamina you men have.

"However, I now advise you that under the law, Judge Browning has the right to compel you, even against the dictates of your conscience, to sign the verdict he has ordered.

"As a matter of fact, it is probable that he has the power to put you in jail until such time as you do sign it, and I

rather imagine, from what has heretofore taken place in this trial, that unless you do sign the verdict, he will cause you to be put in jail.

"As I and my clients feel that you have done all in your power to register your protest and revulsion of feeling at the effect of this decision reached by Judge Browning; as you are helpless to do anything further; and as making you suffer by remaining locked up will not do us a bit of [fol. 520] good, I suggest that you sign the verdict and return to your homes with a clear conscience of having done all that you could to protect the rights of a man whom I feel, and evidently you feel, has been done a gross injustice.

"While we have no appeal from the court's decision in this case, we do have the right again to appeal to his conscience by presenting a motion for new trial in this action—and which motion we will file and argue strenuously with the hope that in the meantime, he will see the error committed and will rectify the same.

"There cannot be any doubt but that the action of you men in registering your protest against this decision, as you have done, will affect him. At least I can only hope that it will. I sincerely thank you."

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[fol. 521] EXHIBIT T-28

*From the Corpus Christi Times, May 28, 1945*

## Mayes' Attorneys Move To File Motion For New Trial

### Judgment Entered for Plaintiff in Ouster Suit

Judgment for possession of the Playboy Cafe premises in the Old Elks Building at Starr and Water Streets having been entered in County Court following a spectacular trial over the week end, counsel for the defense today moved to submit a motion for a new trial to the court.

Judge Joe D. Browning abruptly took the case from the jury Saturday night when he granted a motion of the plaintiff for a directed verdict—without permitting argument on the motion and without requiring the plaintiff's counsel, Dudley Tarlton, to cite his authorities.

*Jurors' Protest*

The jury refused to accept the court's instruction and twice returned a verdict for the defendant before finally

capitulating under pressure 15 hours later, after being locked up over Saturday night.

In their verdict, the jurors expressly stated they were yielding to the pressure of the court and were conforming in the verdict against the judgment of their own conscience.

Bush M. Jackson, building agent, brought the suit against Pvt. Joe L. Mayes of the U. S. Army, who was drafted on Jan. 17 and is now stationed at Camp Hood. Mayes receives a brief furlough to fight the case.

Under the law, the defense counsel—Walter M. Lewright and LeGrand J. Woods—have two days in which to prepare and file their motion for a new trial.

*To Hear Arguments*

This motion the court will rule on before the end of the current term, June 9, and, if it is denied, an order for execution under the judgment will be served on the Playboy or-
[fol. 522] dering evacuation within five days.

Judge Browning, who is sole judge of his fulings on the case in County Court, will hear arguments on the motion and determine whether the new trial is to be granted.

Lewright pointed this out to the jury yesterday morning when he informed the members it was useless for them to continue their hold-out against what he termed a "gross injustice."

"I assure you," Lewright declared to the jurors, "that a motion for a new trial will be presented, since there is no appeal from this court on a forcible detainer suit.

"If his honor is in error—as I believe he is—it's an error that God alone can cure."

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[fol. 523] EXHIBIT C-29

*From the Corpus Christi Caller, May 29, 1945*

Browning's Ruling Prompts Vets' Meeting

Resolution May Ask 'Let Issues Rest With the Jury'

Representatives of seven ex-servicemen's organizations in Nueces County are scheduled to meet tonight to act on a resolution requesting that County Judge Joe D. Browning grant a new trial in the Playboy Cafe eviction suit.

Directors of the Veterans Council, representing 1,331 members of the ex-servicemen's groups, announced last night the resolution also will petition that Judge Browning "let the issues rest with the jury."

*Represents Seven Posts*

Directors of the Veterans Council said last night their organization represents three American Legion Posts in Nueces County, including two in Corpus Christi; two Veterans of Foreign War posts; one Disabled American Veteran post and one Spanish American War Veterans post.

Announcement of the meeting of ex-servicemen's groups coincided with statements last night from attorneys for Pvt. Joe L. Mayes that they will file a motion today in Browning's court asking a new trial. Judge Browning, sole judge of his rulings on the eviction suit, will hear arguments on the motion and determine whether the new trial is to be granted.

*Directed Verdict*

Judgment for the plaintiff in the eviction suit against Private Mayes was entered by Judge Browning, who took the case from a jury Saturday night when he granted a motion of the plaintiff for a directed verdict—without permitting arguments on the motion and without requiring the plaintiff's attorney to cite his authorities.

[fol. 524] Bush M. Jackson, building agent, brought the suit against Private Mayes, who obtained a brief furlough from Camp Hood to fight the case.

Under a leasing arrangement, Mayes operated the cafe located on the ground floor of the old Elks Building, Starr and Water Streets.

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[fol. 525] EXHIBIT T-29

*From the Corpus Christi Times, May 29, 1945*

Motion for New Trial Planned By Lewright

Veterans' Plan Resolution for Presentation

Walter M. Lewright, attorney for Pvt. Joe L. Mayes, defendant in the week-end trial before County Judge Joe D. Browning which ended in a spectacular contest between

the judge and a recalcitrant jury that refused to be bound by his orders, stated this afternoon that he was positively going to file a motion for a new trial.

In the new trial, if his motion is granted, Lewright will seek to overturn an adverse decision in which Mayes was ordered to remove his place of business, known as the Playboy Cafe, from the ground floor of the Old Elks Building at Starr and Water Streets.

Mayes, who was an insurance agent before he went into the cafe business a few years ago, had a lease on the property which expired March 14, but which contained an option giving him an additional year's occupancy.

*Check Refused*

A provision in the option required him to pay an increase in monthly rental of from $250 to $275. His agent, the trial testimony disclosed, had no knowledge of this provision and sent the customary check.

It was refused and Bush M. Jackson, building agent ordered Mayes out. The suit was the result of refusal to be ousted on a technicality and during its pendency, Mayes' counsel deposited $825 in the court registry credited to Jackson's account and representing three months' rent in advance from March 14.

The trial disclosed, however, that Jackson last October had made a deal with Lynn K. (Doc) Mason, former Dragon Grill owner, leasing him the entire premises for $10,800 [fol. 526] annually, and Jackson admitted under oath that he wanted Mayes' business removed despite his option.

*Exercises Legal Right*

Browning has undergone severe criticism from disinterested sources because of the manner in which he terminated the trial. He exercised a legal right to order the jury to find a verdict for the plaintiff and the jury, asserting it was bound by its conscience, twice refused before capitulating on Sunday morning, 15 hours after the order was issued.

Browning was not available today for comment on Lewright's motion for a new trial. At his office it was stated that he would not be in unless probably late this afternoon. He was not at home, either.

The opinion is growing that he will be compelled by rising public sentiment to grant the motion and, if the new trial ensues, to leave the ultimate decision to the jury.

V

An aroused group representing the county's seven veterans' organizations with a membership of 1,121, was in session this afternoon, making plans for a meeting tonight of the Veterans' Council.

They are drafting a resolution in which they intend to petition Browning to grant Mayes a new trial. The motion, if it is to be filed, must be on record before midnight tonight to be valid.

*More Difficulties*

Meanwhile, Browning ran into new difficulties with his forcible detainer judgments, when William L. Scarborough filed a motion for a new trial in the suit of Mrs. L. H. Baskin against Mr. and Mrs. John B. Miller for possession of a dwelling at Upper Broadway and Buffalo Streets.

Browning entered a default judgment yesterday for the plaintiff, represented by T. S. Cyrus. The case had been [fol. 527] appealed from Jack Sutherland's Court where the defendants won the verdict.

Scarborough's motion alleges that the defendants were uninformed as to the appeal and had no knowledge they were required to appear and defend themselves.

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[fol. 528] EXHIBIT C-30

*From the Corpus Christi Caller, May 30, 1945*

*The Crow's Nest*

*Judge and Jury*

The week-end incident in county court lends force to a frequently made argument that the judge should be a lawyer. A layman occupying its bench is bound to end up in hot water sooner or later when he is sitting on a case where fine points of law are argued. Probably the basic fault lies with the Texas constitution and statutes which vest judiciary authority in a county judge but which do not require the occupant of the office to be an attorney. The office is filled, not only in Nueces, but in many other Texas counties, by a layman.

The incident around which the present controversy rages involves such a case. Bush M. Jackson, agent, employed

a technicality in seeking to break the lease of Pvt. Joe L. Mayes of the United States Army on a ground floor location in the old Elks Club building where Mayes operated a cafe. Mayes contends that his lease is still in force.

The case was heard by a jury before County Judge Joe D. Browning. Expert counsel represented the principals. About the only knowledge that Browning, a layman, has with court procedure has been gained during his occupancy of the office. Obviously, he has an even more sketchy knowledge of the points of law which opposing attorneys were arguing.

Yet he instructed the jury to return a verdict for the plaintiff. The jury twice ignored his orders and decided for the defendant. Only when the defendant's counsel advised its members that they were obliged to follow the judge's instruction did they comply, and then with a notation that they were violating their conscience.

[fol. 529] *One-Sided Opinion*

Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on, especialy when a man in the service of his country seems to be getting a raw deal.

But that's not the point. A better objection to the judge's decision deals with a more fundamental issue.

When the testimony was in, the defense counsel offered a motion for an instructed verdict for his client. He was required, as is the custom, to give his authority, and arguments against were made by the plaintiff's attorney. The judge overruled the motion after hearing both sides.

Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a chance to argue against it.

That was the travesty on justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's no wonder that the jury balked and public opinion is outraged.

*Knowledge Essential*

The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances a competent layman would be better qualified, but the county judge's office is an exception. He should be a competent [fol. 530] attorney as well as a competent businessman.

It's the tragedy in a case of this sort that the court where the controversial decision was handed down is the court of last resort. It's too bad that appeal can't be made to a district court and heard by a judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly.

The Lookout, himself a layman, doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority. There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated.

He only knows that respect for the court's ability to mete out justice has been badly shaken, a result that can make for a dangerous condition. Qualified jurists must occupy our benches. Men of conscience must be encouraged to sit in on our juries.

This column is written for the Caller by Bob McCracken. Opinions expressed are those of the writer and do not necessarily reflect the policy of this newspaper.

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## Playboy Cafe Verdict Rapped by Veterans

### Mayes' Attorneys File Motion for New Trial

A motion for a new trial for Pvt. Joe L. Mayes was filed by Walter M. Lewright and LeGrande Woods, defense counsel, yesterday afternoon, as the Soldier's and Sailor's Advisory Council of Corpus Christi passed a resolution labeling County Judge Joe D. Browning's order for a directed verdict against Mayes "a gross miscarriage of justice."

These are the latest developments in the train of events which began last Friday in County Court in the suit of Bush M. Jackson, et al. versus Joe L. Mayes, et al., in which [fol. 531] Jackson sought to oust Mayes, now a private stationed with the Army at Camp Hood, from his place of business in the Old Elks Club building.

*Purpose of Council*

The Soldier's and Sailor's Advisory Council, formed in 1940, with the avowed purpose of protecting the rights of men in uniform, is composed of representatives of two American Legion posts, two Veterans of Foreign Wars posts, which claim a combined membership of over 1,000.

The council's resolution called on Browning to grant Mayes a new trial on the grounds that he had committed an error in instructing the jury to find for the plaintiff. The petition asked that Browning, upon granting the new trial, should disqualify himself to further sit as judge in the trial, and should permit the trial to be retried before another judge and jury.

The petition was signed by Frank C. Bonner, chairman, and Rex L. Vickery, secretary.

*Basis of Petition*

The motion for a new trial, filed late yesterday afternoon, was based on the following principal grounds:

1. That the lease between Jackson and Mayes did not contain an express waiver by Mayes of the duty of the plaintiff to demand his rental before he could foreclose for nonpayment of rents.

2. Because evidence raised the issue of fact to be determined by the jury, of whether the defendants notified Jackson of the fact that they elected to exercise their option of renewing the lease for the additional one year period of time provided for in the lease.

*Defendants' Understanding*

3. Because the evidence raised the issue, to be determined by the jury, that the plaintiffs had lead the defendants to believe that the rentals under the terms of the lease might be paid at any reasonable time after the maturity date thereof.

[fol. 532] 4. Because the evidence raised the issue, to be determined by the jury, whether or not on March 19, 1945, the plaintiffs refused to accept any rental payable under terms of the lease.

5. That the court erred in entering judgment in favor of the plaintiffs, since the true verdict of the jury and rendered in the case was in favor of the defendants and not for the plaintiffs,

6. Because the evidence in the case showed that the plaintiffs were not entitled to possession of *were not entitled to possession of* the premises involved, and that the true party plaintiff was the witness L. K. Mason, who was not a party plaintiff, and who did not make the affidavit of forcible detainer as required under the statutes of Texas and the rules promulgated by the Supreme Court of Texas relating to the proceedings of the character involved.

*True Plaintiff*

7. Because the evidence raised the issue, to be determined by the jury of whether the true party plaintiff in the action, L. K. Mason, authorized the bringing of the proceedings, in the absence of which authorization the plaintiffs are not entitled to maintain the same.

During the testimony Saturday, Mayes and his agent, F. F. Burchard, maintained that they had not known of any clause in the contract which called for a jump of $25 per month in rental, the basis of the plaintiff's petition that the premises be returned to them.

Mayes' contract, which terminated March 14, 1945, had an option clause in it which allowed Mayes to retain possession of the Elks Club premises for another year, but which called for a raise from $250 to $275 monthly in rental.

Burchard sent a check for $250 rental following the expiration of the contract, but it was returned and Jackson asked for possession. Burchard later sent a new check for [fol. 533] $275 but it also was refused.

*Appealed from Justice Court*

The suit was first heard in Justice of the Peace Carl Crow's Court. Crow found for the plaintiff but Mayes attorneys filed an appeal.

Mayes has been operating the Elks Club ground floor as the Playboy Cafe. He has been in the Army since January.

He came here last week end on a short furlough to appear at the trial.

The trial reached a climax Saturday night when Browning, on motion of Dudley Tarlton Jackson's counsel, and without argument or citation of authority, instructed the six-man County Court jury to find for Jackson. The jury twice refused, both times bringing in verdicts in favor of Mayes and against Jackson.

Browning had the jury confined to the courthouse jury room all Saturday night, Sunday morning, when the court convened, the jury reported that it still had not signed the verdict in favor of Jackson.

Browning announced that he would lock the jury up again until Monday morning. However, Walter M. Lewright advised the jurymen that they should not continue to "suffer" any longer and should sign the verdict since Browning had the legal right to force them to do so. The jury signed the verdict but appended a statement asserting that they did so under pressure.

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[fol. 534] EXHIBIT T-30

*From the Corpus Christi Times, May 30, 1945*

Judge Browning Unavailable for Comment on Case

Veterans Council Asks New Trial of Playboy Suit

Judge Joe D. Browning could not be reached today for comment on the resolution adopted last night by the Corpus Christi Veterans Council, condemning his directed verdict in County Court as "a gross miscarriage of justice against a member of the armed forces of the United States."

The directed verdict came Sunday as the climax of the ouster suit of Bush M. Jackson, agent of the Old Elks Club Building, who sought to regain possession of the ground floor premises occupied by the Playboy Cafe owned by Joe D. Mayes now a private in the Army.

*Browning Censured*

Browning failed to appear at his office in the County Courthouse yesterday, although the current item of County Court is still on. Neither was he to be reached at his home. The courthouse was closed today and all suits on the docket were moved forward.

The veterans' delegation met last night at a downtown office for a discussion of the Jackson-Mayes case and finally adopted a resolution strongly censuring Browning and asking that he grant the motion of Walter M. Lewright, counsel for Mayes, asking for a new trial.

In this resolution, it was also asked that Browning disqualify himself and permit the trial to go on before another judge and jury. Frank C. Bonner, chairman; and Rex L. Vickery, secretary signed and attested the resolution.

*May Permit Argument*

Lewright's motion was filed late yesterday with the court clerk. In it were cited 15 legal points on which the defendant rests the plea for a new trial.

[fol. 535] While Judge Browning's intentions are not known with relation to the motion for a new trial, it is generally believed he will permit argument on it in open court, especially in view of the censure to which he has been subjected as a result of his preemptive act in granting Tarlton's motion for an instructed verdict.

The judge is under no compulsion, however, to conduct such a hearing, and he may if he chooses, dispose of Lewright's new move in the same manner in which he granted Tarlton's request for a directed verdict.

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[fol. 536] EXHIBIT C-31

*From the Corpus Christi Caller, May 31, 1945*

Three Petitions for New Trial in Suit Reported

Loser in Playboy Cafe Case May Get Mothers' Groups Aid

Three local groups were reported last night to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy Cafe ouster suit.

One petition is reported being drawn by a parents and teachers' group, another by a service mothers' group, and the third is being drawn for independent circulation among parents of men in service.

The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi Soldier's and

Sailor's Advisory Council Tuesday night. This petition called on Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under another judge and jury. Action on the petitions is expected shortly.

*Follows New Trial Motion*

The council's petition, drawn up by five veterans' organizations with a membership of more than 1,000, followed by a few hours the filing of a motion for new trial by Walter M. Lewright and LeGrand Woods, Mayes' counsels.

Mayes who was inducted into the Army last January, was sued by Bush M. Jackson for possession of the premises occupied by the Playboy Cafe in the Old Elks Club Building on the claim that Mayes had violated terms of a lease option contract.

The trial in county court which had its beginning in a forcible detainer suit in Justice of the Peace Carl Crow's court, opened last Friday. It came to a climax Sunday when Browning Saturday night accepted without argument or citation of authority a motion by Dudley Tarlton Jackson's lawyer, for an instructed verdict.

[fol. 537] *Browning Unavailable*

However, the six-man jury refused to comply with Browning's instructions and twice returned a verdict in favor of Mayes.

The jury was kept Saturday night in the Court House. Sunday morning, following a threat by Browning to keep the jury together until they did sign, the jurymen signed the verdict, appending a statement that they did so against the dictates of their conscience.

Judge Browning was not available late last night for comment. He did not appear at his offices in the Court House Tuesday. The Court House was closed yesterday and cases on the docket were moved forward.

[fol. 538] EXHIBIT T-31

*From the Corpus Christi Times, May 31, 1945*

## Browning Sets Cafe Suit Hearing For Wednesday Morning

### Mayes' Council Presents Request To County Judge

Judge Joe D. Browning today set down hearing on the motion for a new trial in the Playboy Cafe suit for Wednesday at 9:30 A. M., June 6.

The motion was filed by Walter M. Lewright and LeGrand J. Woods, counsel for Pvt. Joe L. Mayes of Camp Hood, owner of the Playboy, against whom Judge Browning ordered a directed verdict to conclude a week-end trial in County Court.

Because the jury twice refused to accept the court's instruction, and held that it was bound in conscience to find for the defendant the case has attracted wide attention since its spectacular conclusion at 10 o'clock, last Sunday morning.

*Petition Received*

Lewright and Woods appeared in court this morning and advised Browning that they had learned Dudley Tarlton, counsel for Bush M. Jackson, who was plaintiff in the ouster suit for possession of the premises, had left town and would not return until Tuesday.

"We have no desire to argue our motion with the opposing counsel not present;" said Lewright, "and for that reason, we seek that you set down hearing on our motion for next week."

Subsequent to the morning court session. Browning at his office stated, when asked, that he had received the petition of the Corpus Christi Veterans Council, asking that he not only grant a new trial for Mayes, but also excuse himself and appoint another judge to conduct the trial before a jury.

*Insists on Legality*

Browning said he had no comment to make at this time on the petition and that he had not decided whether he would make reply to the council. The document was not a letter,

[fol. 539] he pointed out but a resolution of the organization.

He had no comment, either, on reports of other petitions being circulated for the purpose of reporting to him public sentiment asking that Mayes have another hearing.

The judge insisted that he was within the law and within his jurisdiction as county judge in handing down instruction to the jury when the evidence was in. He recalled that in his capacity as justice of the peace and, later, as county judge, he had handled hundreds of forcible entry and detainer suits.

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[fol. 540] *From the Corpus Christi Times, May 21, 1945*

## Trial of Play Boy Cafe Suit Set for Friday

Trial of the lawsuit of Bush M. Jackson, agent for the Old Elks Club at Starr and Water Street, against Pvt. Joe L. May-s of the Army, in which Jackson seeks possession of the Play Boy Cafe on the ground floor of the club, was set down for 2 o'clock Friday afternoon, today.

The setting was ordered by County Judge Joe D. Browning before whom the case is to be heard on appeal from Justice of the Peace Carl W. Crow.

At the earlier hearing in the court, a judgment in favor of Jackson was rendered, but May-s, through his counsel, filed an appeal.

The plaintiff's case hinges on a lease that expired March 1. The lease, however, had an option attached which gave Mayes the right to continue his occupany of the premises for another 12 months for a rental of $275 monthly, compared with the $250 paid under the lease.

F. F. Burchard, acting as agent for May-s, forwarded a check for $250 on March 1, ignorant at the time of the provision for an additional charge. The check was refused by Jackson who, a short time later, instituted ouster proceedings refusing also to accept a corrected check.

Other trials set today were: Norman King, possession of whiskey for sale without a permit, May 23; Cruz Rodriguez, petty theft, May 31; Jim Cressy, drunkenness, May 31; Anna E. Johnson, negligent collision, May 31; Carmela Garnales, sale of beer to a minor, May 23.

J. D. Hardy and Margaret Hardy, keeping a disorderly house, May 30; Vonie Morris aggravated assault, May 30;

A. J. Neff, assault, May 29; Oliver Jones, Jr., and Eural Richardson, petty theft, May 23; Guadalupe Lopez, assault, continued; Francis M. Neff, sale of liquor to a minor, [fol. 541] May 23.

Betty Creech, negligent collision continued; Ernest Campbell, disturbing the peace, May 31; Charles N. Ferrell, vagrancy, continued.

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[fol. 542] *From the Corpus Christi Times, May 25, 1945*

## Opening of Ouster Suit Delayed by Absence of Judge Browning Grounded in Austin on Way Back for Trial

Opening of the suit to determine who has the right to use and occupancy of the ground floor of the Old Elks Club building at the corner of Starr and Water Streets, now occupied as the Playboy Cafe, was delayed this afternoon when County Judge Joe D. Browning failed to return to this city from North Texas.

Judge Browning, who has been absent from the county courthouse for the past three days, telephon- from Austin, late last night asking that he be sent for after being grounded in that city on his homeward flight.

The trial was set down to open at 2 p. m. today but at that hour no word had been received from Browning either at his office or at his home. It was presumed that he was on the road and might momentarily arrive.

*Appeal Filed*

Testimony in the case, styled as Bush M. Jackson against Joe L. Mayes, is expected to be lengthy and will probably occupy more than an afternoon or morning session of the court.

It was heard earlier in Justice of the Peace Court as a forcible detainer suit in which Jackson sought to obtain an order against Mayes, now a private in the U. S. Army, requiring him to vacate the premises.

Justice of the Peace Carl W. Crow handed down a judgment for the plaintiff, but Mayes, through his agent, F. F. Burchard, filed an immediate appeal.

During the lower court hearing, the defense counsel placed Dac Mason, former operator of the Dragon Grill, on the stand and Mason identified himself as agent for Jackson in seeking the ouster of Mayes.

[fol. 543] *From the Corpus Christi Times, May 25, 1945*

*To Battle Ouster*

The plaintiff claims that Burchard, as Mayes' agent, failed to live up to terms of an option which went into effect upon expiration of Mayes' lease, March 1. This is the basis of Jackson's suit.

On the other hand, Mayes' defense is that Burchard was unfamiliar with the terms of the lease and that the violation was an oversight.

Counsel for the defense intends to battle the ouster proceedings as a test of the Soldiers and Sailors Act of Congress.

Walter Koch and Dudley Tarlton are counsel for Jackson, while Walter M. Lewright of Kemp, Lewright, Dyer, Wilson & Sorrell, and LeGrand J. Woods are counsel for the defense.

It was understood this afternoon that Mayes was in the city ready to appear as a witness in his own behalf, having obtained a furlough through his superiors to fight the case.

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[fol. 544] *From the Corpus Christi Caller, June 1, 1945*

Browning Says He Believes Directed Verdict Justified

County Judge Joe D. Browning last night asserted that he believed that he was justified, after consideration of argument from both sides, in ordering a six-man jury to return a directed verdict for Bush M. Jackson in his suit to oust Pvt. Joe L. Mayes from his place of business in the Old Elks Club building.

Browning's statement came after he had set a motion of Mayes' attorneys for a new trial for hearing Wednesday, June 6, at 9:30 o'clock in the morning.

*To Consider Objections*

Browning said that although he believed he had not been in error in instructing the jury, he was willing to consider the points of objections raised by Mayes attorneys in their motion filed Tuesday.

Jackson sued Mayes for possession of the ground floor premises of the Playboy Cafe in the Elks Building. He alleged that Mayes had violated an option clause in his contract.

The trial began last Friday. Saturday night, Browning accepted a motion for an instructed verdict presented by Dudley Tarlton. Browning ordered the jury to return a verdict for Jackson. The jury refused and twice brought in verdicts for Mayes and against Jackson.

The jury was kept at the courthouse Saturday night. Sunday morning, it reported that a verdict had not yet been signed. Browning prepared to keep the jurors at the courthouse until Monday. The jurors, after being urged by Walter M. Lewright, attorneys for Mayes, to sign because Browning had the legal right to force them to do so, did sign the verdict, but attached a statement that they did so against their conscience.

*Veteran's Group Acts*

An organization, representing five veterans' groups, petitioned Browning to grant Mayes a new trial and, upon granting it, to disqualify himself and let another judge and jury sit in the new trial.

[fol. 545] *From the Corpus Christi Caller, May 17, 1945*

Forcible Detainer Suit to come Before
County Court May 21

County Judge Joe D. Browning announced yesterday that trial of the forcible detainer suit of Bush M. Jackson against Pvt. Joe L. Mays will be heard on May 21.

The case is an appeal from a judgment against Mays in Justice of the Peace Carl W. Crowe's court, after Jackson sued for possession of the ground floor of the Old Elks Club building at Starr and Water Streets.

Mays operates a beer cafe under the name of "The Playboy" at that location. The cafe has been under the management of F. F. Burchard as agent for Mays since he entered the Army.

[fol. 546] *From the Corpus Christi Caller, June 5, 1945*

## Browning Cites 3 Newsmen for Contempt

### Stories in Caller-Times about Playboy Cafe Trial Basis of Judge's Citation

County Judge Joe D. Browning last night caused citations to be issued against the publisher of The Caller-Times, the managing editor, and a reporter, requiring their appearance before him at 9:30 a. m., Friday, in answer to charges that they were guilty of contempt of court.

The allegation is based on published reports of the trial before Browning on May 25, 26 and 27 of a suit for forcible entry and detainer, styled Bush M. Jackson, et al., vs. Joe L. Mayes, et al.

Defendants cited were Conway Craig, publisher; Bob McCracken, managing editor; and Tom Mulvany, reporter. They are held guilty of contempt and it is "ordered, adjudged and decreed by the court that (they) be punished by confinement in the County Jail of Nueces County, Texas, for three days, unless they purge themselves thereof."

*'Against Their Conscience'*

The trial of the Jackson-Mayes suit came to a climax Saturday night, May 26, when a jury of six men, announcing they could not find "against their conscience," twice refused to follow instructions of the judge.

Browning had ordered them, on the motion of Dudley Tarlton, counsel for the plaintiff, to return a verdict for Jackson, the plaintiff.

In each instance the jury returned a verdict for the defendant, Pvt. Joe L. Mayes of Camp Hood, owner of the Playboy Cafe at Starr and Water Streets in the Old Elks Club Building.

Judge Browning ordered the jury locked up overnight after it had for the third time refused to sign the instructed verdict, and, at 9 a. m., Sunday called the six men again before him.

When the jury, in reply to his specific question, advised [fol. 547] him it had not signed the verdict, Judge Browning told the members that court would convene at 9 a.m., Monday.

Before the six men filed out of court, Walter W. Lewright, counsel for Mayes, made an address to the man,

urging that they discontinue their futile battle "to protect the rights of a man whom I feel, and evidently you feel, has been done a gross injustice."

Lewright also recalled to the jury that the judge "has the right to compel you, even against the dictates of your conscience, to sign the verdict he has ordered." The attorney also stated that the judge probably had the right to put the jury in jail.

On the second occasion when the jury returned the verdict in favor of Mayes, its foreman, A. D. Kirk of Bonner Drive, Gardendale, and H. G. Wernette of 2829 Lawndale Street, protested that in following the judge's instructions they would be finding "against our conscience."

*Issue in Case*

The issue in the trial was whether Jackson, who testified he had given a lease to Lynn K. (Doc) Mason for the entire building, last October, at an annual rental of $10,800, should have possession on the ground that Mayes and his agent, Floyd F. Burchard had violated terms of their lease.

Mayes, drafted on Jan. 17, left his business in charge of Burchard. Burchard testified he had never seen the lease agreement which, expiring on March 14, gave him option to continue for another 12 months upon payment of monthly rental of $275, as compared with the previous $250 monthly rental requirement.

He testified that he sent a check to Jackson on March 14 for $250 and that not until after it was rejected did he learn of the provision for an increase. Jackson and his agents subsequently refused his offers of tender for the difference, he stated on the stand.

[fol. 548] The trial concluded at 9:45 a. m. Sunday when the jury finally signed the verdict but with the annotation:

"It to be understood that this verdict is rendered and recorded with the order of this court against the conscience of this jury."

*Retrial Hearing Tomorrow*

Hearing on a motion of defense counsel for a new trial is scheduled to take place at 9:30 a. m. tomorrow morning before Browning. In suits of forcible detainer, the County Court is the final arbiter, the state law providing no appeal to a higher tribunal.

Browning's citation against the newspapermen was obtained over the affidavit of Newt Wright, county interpreter and veteran employee of Nueces County Courthouse, who was not present during the Jackson-Mayes hearing.

The citation alleges the trio of newspapermen is guilty of contempt in the following respects:

"That while this honorable court was in regular session, having been called on the 21st day of May, 1945, there was pending before the said court for judicial determination cause No. 3624, wherein B. M. Jackson, Franklin Flato, Frederick Flato and Harry G. Heaney were plaintiff, and Joe L. Mayes and F. F. Burchard were defendants; that said cause was an appeal to this honorable court by the defendants from a judgment for the plaintiffs in Justice Court for Place 1, Precinct 1, of this county, and came on for trial de novo on the 25th day of May, 1945; and that the court did, after having impaneled a jury and heard the evidence on the said cause and on a motion of the plaintiff's, instruct the jury to return a verdict for the plaintiffs, and against the defendants; and the jury having on the 27th day of May, 1945, pursuant to such instructions, returned the said verdict, the court rendered judgment for the plaintiffs, to which judgment the defendants did then and there in open court except; that on the 29th day of [fol. 549] May, 1945, the defendants timely filed their motion for a new trial in said cause, and that said motion was set for hearing at 9 a. m. on the 6th day of June, 1943, and that said cause, at the time the hereinafter complained of acts were done and this affidavit is made, is still pending before this court.

'Without Justification'

"Affiant would farther show that he is interested in said cause by virtue of being an officer of the said court. Affiant would further show the court that on the dates hereinafter shown Conway C. Craig, publisher of the Corpus Christi Caller, the Corpus Christi Times, and the Corpus Christi Caller-Times, the first two named being daily newspapers of general Circulation if the City of Corpus Christi and County of Nueces, where the cause aforesaid is now pending, and the Corpus Christi Caller-Times being a Sunday newspaper of general circulation in the City and County aforesaid, together with Bob McCracken, an editorial

writer, and Tom Mulvaney, a news writer, of the newspapers aforesaid, did knowingly and wilfully, without justification or excuse, when they could and should have done otherwise, write, publish and circulate, the hereinafter purported factual news stories and editorial comments.

"On the 26th day of May, 1945, in the Corpus Christi Caller, there was published a purported news story which included the statement "that Burchard further claimed that although he had not known of the option clause, when he learned of it he immediately proffered a check for $275.00 rental; that on the 27th day of May, 1945, in the Corpus Christi Caller-Times, there was written, published and circulated a purported news story of proceedings had that included the following statement:

"'At 7 p.m. Browning, without listening to argument from counsel for either side on the plaintiff's motion presented by Dudley Tarlton for Jackson, and without giving the six-man jury opportunity to weigh the evidence, in-[fol. 530] structed the jury to find against Mayes. W. M. Lewright, Mayes' attorney, protested that the court's arbitrary action had ruled that Tarlton's "one-page motion" did not need supporting argument and citation of authorities; that on the 28th day of May, 1945, there was written, published and circulated in the Corpus Christi Caller an article which contained the following language:

"'Browning accepted Tarlton's one-page motion, and without permitting argument or citation of authorities to support the motion, ruled that it be granted. The effect of this ruling was that Browning took the matter from the jury.'

"That said article also included the following speech made by Walter Lewright, of counsel for the defendants:

"'However, I now advise you that under the law, Judge Browning has the right to compel you, even against the dictates of your conscience, to sign the verdict he has ordered.

"'As a matter of fact, it is probable that he has the power to put you in jail until such time as you sign it, and I rather imagine, from what has heretofore taken place in this trial, that unless you do sign the verdict, he will cause you to be put in jail.

"'As I and my clients feel that you have done all in your power to register your protest and revulsion of feeling at the effect of this decision reached by Judge Browning; as you are helpless to do anything further; and as making you suffer by remaining locked up will not do us a bit of good, I suggest that you sign the verdict and return to your homes with a clear conscience of having done all that you could to protect the rights of the man whom I feel, and evidently you feel, has been done a gross injustice.

"'While we have no appeal from the court's decision in this case, we do have the right again to appeal to his conscience by presenting a motion for a new trial in this action—and which motion we will file and argue strenuously [fol. 551] with the hope that in the meantime he will see the error committed and will rectify the same.

"'There cannot be any doubt but that the action of you men in registering your protest against this decision, as you have done, will affect him. At least, I can only hope that it will. I sincerely thank you.''

"That on the 30th day of May, 1945, in an article written by the aforesaid Bob McCracken, and published in The Corpus Christi Caller under the editorial masthead, the Crow's Nest, there was contained the following language:

"'Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on, especially when a man in the service of his country seems to be getting a raw deal.'

"And further:

"'Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a chance to argue against it.

"'That was the travesty of justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's

no wonder that the jury balked and public opinion is outraged.

"'The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where the fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances, a competent layman would be better qualified, but the county judge's office in an exception. He should [fol. 552] be a competent attorney as well as a competent businessman.

"'It's a tragedy in a case of this sort that the court where the controversial decision was handed down is the court of last resort. It's too bad that appeal can't be made to a district court and heard by a judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel, and to make his decisions accordingly.''

"And further:

"'There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated.''

"That on the same 30th day of May, 1945, in the same issue of The Corpus Christi Caller, there appeared what purported to be a report of action taken by the Sailor's and Soldier's advisory Council of Corpus Christi, and said action reported to have been the passage of a resolution 'labeling County Judge Joe D. Browning's order for a directed verdict against Mayes a 'gross miscarriage of justice,'

"The said article further states that.

"'The council's resolution called on Browning to grant Mayes a new trial on the grounds that he had committed an error in instructing the jury to find for the plaintiff. The petition asked that Browning, upon granting the new trial, should permit the case to be retried before another judge and jury.'

"And further:

"'The trial reached a climax Saturday night when Browning, on motion of Dudley Tarlton, Jackson's coun-

sel, and without argument or citation of authorities, instructed the six-man County Court jury to find for Jackson. The jury twice refused, both times bringing in verdicts in favor of Mayes and against Jackson. Browning had the jury confined to the court house jury room all Saturday [fol. 553] night. Sunday morning when the court convened, the jury reported that it still had not signed the verdict in favor of Jackson. Browning announced that he would lock the jury up until Monday morning. However, Walter N. Lewright, advised the jurymen that they should not continue to "suffer" any longer, and should sign the verdict, since Browning had a legal right to force them to do so. The jury signed the verdict, but appended a statement asserting that they did so under pressure.'

"That on the 31st day of May, 1945, there was written, published and circulated by the persons aforesaid in The Corpus Christi Caller a purported news story, which said:

" 'Three local groups were reported to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy Cafe ouster suit.

" 'One petition reportedly being drawn by a parent and teacher's group, another by a service mothers' group, and the third is being drawn for independent circulation among parents of men in service.

" 'The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi Soldier's and Sailor's Advisory Council Tuesday night. This petition called on Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under another judge and jury. Action on the petitions is expected shortly.

" 'The council's petition, drawn by five veterans' organizations with a membership of over 1,000, followed by a few hours the filing of a motion for new trial by Walter M. Lewright and LeGrand Woods, Mayes' counsels."

"The article also contained the following language:

" 'It came to a climax Sunday when Browning Saturday night accepted without argument or citation of authority a motion by Dudley Tarlton, Jackson's lawyer, for an instructed verdict."

[fol. 554] "The same articles said further:

" 'The jury was kept Saturday night in the courthouse. Sunday morning, following a threat by Browning to keep the jury together until they did sign, the jurymen signed the verdict, appending a statement that they did so against the dictates of their conscience.'

"Affiant would farther state that the articles aforesaid, in their entirety and considered together, were calculated and intended to falsely present to the public the nature of the proceedings had, and to compel a different result on the hearing of a new trial, that the said articles falsely stated that Mayes was an ex-insurance man, when in truth and in fact his principal business during the time the said cause was pending was and is the insurance business.

"The said articles, and all of them, failed to state the terms of the contract declared on by plaintiffs; they failed to state that the check which the defendant Burchard testified he had proffered was tendered seven days late, and that the said check was postdated 30 days from the date tendered, and could not, in consequence, be considered a legal tender of rent money.

"The said articles omitted to state that the arrangements under which the premises were operated had been in existence for some months before the defendant Mayes was inducted into the Army. The said articles failed to state the legal grounds upon which plaintiffs' motion for an instructed verdict was urged and granted, but referred to it in a derogatory manner in quotations, as a "one-page motion." That the articles omitted much material evidence that would have enabled the public generally to form a fair estimate of the real nature of the controversy; that the articles failed and omitted the names of the principal plaintiffs, who are highly respected business and professional men of Corpus Christi, Texas; that the articles needlessly reported and emphasized the fact that the de-[fol. 555] fendant Mayes was in the armed service; that the articles repeated, reiterated and over-emphasized the court's insistence that the verdict be returned in accordance with its instructions; that the articles needlessly repeated, reiterated and over-emphasized the fact that no argument was heard on plaintiff's motion, and gave no prominence to the fact that defendant's motion for an instructed verdict

was argued by defendant's counsel for ninety minutes, and that ruling on that motion was held in abeyance until all the evidence was in.

"That the articles failed to state that the jury had no right to conclude what the law might be upon the proof of any given set of facts, but that they were duty bound to receive the law from the court; that the articles failed and omitted to state that the court was under no duty to hear arguments or the citation of authorities from either party, and that remarks of counsel for the defendants were set forth verbatim and given prominence, while remarks of counsel for the plaintiffs were omitted or given no prominence.

"Affiant would further show the court that these articles, in their entirety and standing alone and together, were wilfully and knowingly written, published and circulated by the persons aforesaid for the purpose of presenting to the reading public by means of false statements, omissions, distortions and over-emphasis, that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen, unable because of his service to his county, to defend himself, of his rights in and to valuable property, and that counsel for plaintiffs and the court aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful.

[fol. 556] "Affiant would further show the court that the purpose of this representation to the citizenry of the City of Corpus Christi and County of Nueces was intended and calculated to reflect upon the integrity of the court, and bring it into dispute and prejudice and inflence the court in its ruling on the aforesaid motion for a new trial, and that the said publications and circulations were made for the purpose and with the intent of scandalizing the court, and intended to influence or overawe its deliberations in said pending cause, and were made at a time and under circumstances calculated to affect the force of justice in said proceedings, and were so calculated to do and were intended for that purpose.

"Affiant would further show the court that the said Conway C. Craig, Bob McCracken and Tom Mulvaney are, by reason of the said writing, publication and circulation, guilty of contempt of this court.

"It is, therefore, ordered, adjudged and decreed by the court that the said Conway C. Craig, Bob McCracken and Tom Mulvaney be and they are hereby held guilty of contempt as aforesaid, and that they be punished by confinement in the County Jail of Nueces County, Texas, for three days, unless they purge themselves thereof.

"It is further ordered that the said Conway C. Craig, Bob McCracken and Tom Mulvaney be cited by scire facias to appear before said court at the courthouse in Corpus Christi, Texas, on the 8th day of June, 1945, at 9:30 A. M., then and there to show cause why this judgment shall not be made final and absolute against them, and that a certified copy of such affidavit and of this judgment be served upon them, together with a copy of such scire facias.

"Joe D. Browning, Judge of the County Court of Nueces County, Texas."

[fol. 557] From the Corpus Christi Times, June 5, 1945

WE WILL NOT BE INTIMIDATED

(An Editorial)

"Congress shall make no law . . . abridging the freedom of speech or of the press."

—First Amendment to the Constitution of the United States.

The first article of the Bill of Rights guarantees to Americans a free press. That fundamental right of the people applies not only to Congress, but it guarantees the people's press freedom from any official domination.

Joe D. Browning, Nueces County Judge, has cited for contempt Conway Craig, published of The Caller-Times; Bob McCracken, managing editor; and Tom Mulvany, reporter. The citations direct that the three "purge" themselves of contempt which it is contended was shown in the publication of articles about the Mayes' case, or face three-day jail sentences.

It is difficult to see what Browning considers "contempt." The Caller-Times published a full account of the Mayes'

case because it believed that the people were entitled to know what goes on in their county court. It has always published the news of public matters; it will continue to do so no matter how many of its officials or employees are threatened with jail.

The Caller-Times would be derelict in its duty and false to its trust if it did not report all of the news and if it were afraid to publish editorial comment on public matters in the clearly-designated editorial columns of the paper.

A free press is the bulwark of the peoples' liberties. And that liberty must be protected at the local courthouse as well as at San Francisco or Yalta or at some distant world peace conference. It ill-behooves us to champion liberty in far-off corners of the world and submit to petty tyranny at home.

The Caller-Times is not contemptuous of the courts. It intendes to report the facts and let the facts speak for [fol. 558] themselves. It will continue to stress its belief in the importance of freedom of the press and the equal importance of courts of justice and dignity and integrity.

Two Newsmen Served Contempt Summons.

Bob McCracken and Tom Mulvany Accept Deputies' Service.

Conway C. Craig will be here for hearing Friday.

Sheriff's deputies last night served summons on two of three principals, cited by County Judge Joe D. Browning yesterday in his contempt proceedings arising over published statements in The Caller-Times concerning trial before Browning of the suit of Bush M. Jackson, et al., vs. Joe L. Mayes et al., May 24, 25 and 26.

Voluntarily accepting service of the summons last night were Bob McCracken, managing editor of The Caller-Times, and Tom Mulvany, reporter.

Conway C. Craig, publisher and third person named in the proceedings, was not served last night. He is leaving Corpus Christi today for Kerrville to accompany his daughter to a summer camp.

*Hearing Set Friday.*

He was scheduled to be in Austin Saturday to open a meeting of the Texas Newspapers Publishers Assn., of which he is state president. Hearing on the contempt of

court allegations, however, was set down by Browning for Friday at 9:30 a. m.

Marcelius G. Eckhardt, counsel for Craig, said this morning that while Craig has not been served he will return voluntarily Friday to be present at the hearing.

The three newspapermen are held guilty of contempt in Browning's citation, and it is "ordered, adjudged and decreed by the court that (they) be punished by confinement in [fol. 559] the County Jail of Nueces County, Texas, for three days, unless they purge themselves thereof."

The Jackson-Mayes suit was one for forcible entry and detainer in which Jackson, as agent for the owners of the Old Elks Club at Starr and Water Streets, sought to oust Mayes, a private in the Army since he was drafted last January, from his place of business known as the Play Boy Cafe.

Evidence adduced at the trial revealed that the cause of the action arose last March 14 when Floyd F. Burchard, agent for Mayes, in what he professed was ignorance of the lease option provisions, sent Jackson a check for $250 for monthly rental.

The lease option clause called for $275 monthly rental after that date. Burchard testified he subsequently went to Jackson and his agents and tried to have them accept the difference and that they refused.

*Instructed Verdict Asked*

When the testimony had ended after 5 p. m., Saturday, May 26, Browning excused the jury until 7 p. m., stating that the attorneys were to appear at 6 p. m. to argue a motion of Dudley Tarlton's—counsel for Jackson—asking that the court grant an instructed verdict for the plaintiff.

Earlier in the day, Walter M. Lewright, counsel for the defendant, had presented a similar motion when the plaintiff had rested, asking for an instructed verdict in favor of the defendant.

After 90 minutes of argument, the court declined to rule on Lewright's motion and directed that the defense proceed.

At 7 p. m., when the jury returned, Browning confronted the six members and briefly advised them to go out and sign a prepared verdict finding for the plaintiff. There had been no argument on Tarlton's motion.

The jury bucked. Twice that night it returned a verdict for the defendant, altering the prepared form it had been

[fol. 560] handed. On being sent out the third time, two of its members protested against being compelled to find "against their conscience."

On failing to return the third time, Saturday night, Browning ordered the jury locked up and announced court would convene in the morning.

The following morning, when the jury was brought in, its foreman announced that the verdict had not been signed. Browning retorted that the court would reconvene at 9 a. m. Monday. Lewright jumped up and addressed the jurors.

He advised the jurors that under the law, Browning had the right "to compel you, even against the dictates of your own conscience, to sign the verdict he had ordered. * * *

"I suggest that you sign the verdict and return to your homes with a clear conscience of having done all that you could to protect the rights of a man whom I feel, and evidently you feel, has been done a gross injustice."

*Jury Appends Note*

The jury finally signed the verdict at 9:45 a. m., Sunday, but with this note appended and made a part of their verdict:

"It is to be understood that this verdict is rendered and recorded with the order of this court against the conscience of this jury."

For reporting these facts and the fact that the Soldiers and Sailors Council subsequently met and denounced the instructed verdict as "a gross miscarriage of justice," the contempt proceedings had their origin.

The Veterans Council also asked that Browning grant Mayes a new trial and that the judge recuse himself, leaving the issues to be tried before another judge and another jury.

The contempt citation alleges that The Caller-Times was in contempt in that it overemphasized the fact that Mayes was a private in the Army stationed at Camp Hood.

[fol. 561] McCracken was cited because of an article appearing under date of May 30 in his daily column feature on the Caller front page in which he commented editorially on the action of Browning and observed the jury's reaction.

McCracken had noted that: "Browning's behavior and attitude has brought down the wrath of public opinion on his head, properly so."

The main point in McCracken's column,—that Browning is not a lawyer—was not mentioned in the citation against him.

*Judge's Action Condemned*

This afternoon, members of the Army Mothers' Club of Corpus Christi prepared a resolution condemning the action of Browning in instructing the jury in the Jackson-Mayes case as a gross injustice.

The resolution specifically censured Browning for instructing the jury to find for the plaintiff, Jackson, against the defendant, Mayes and "for compelling the jury to return a verdict against its conscience."

Signing the resolution were: Mrs. W. J. Smith, president; Mrs. C. G. Harwood, vice president; Mrs. Joe Shepard, secretary; Mrs. F. E. Beckenpaugh, treasurer; and Mrs. T. H. Sanders and Mrs. L. E. Allison, members.

[fol. 562] From The Corpus Christi Caller, June 6, 1945

The Crow's Nest

*More Jails Needed*

Judge Joe D. Browning has cited the Lookout, Conway Craig, publisher of The Caller-Times, and Tom Mulvany, a reporter, for contempt of county court where Judge Browning presides.

We are ordered to appear Friday morning. Unless we "purge" ourselves of the charges, the judge will order us confined to the county jail for a period of three days.

If Judge Browning has any idea that he is humiliating or punishing the Lookout and The Caller-Times with such action, he is engaging in some wishful thinking. The Lookout bent over backward in an effort to be fair and pertinent in his comment and criticism of the conduct of the case, the same as the reporter made every effort to give a fair and accurate account of the proceedings. The Lookout is honored to be cited for contempt under the circumstances if that's contempt.

If Judge Browning is inaugurating a policy of citing for contempt anyone who is or has been critical of his manner of handling cases brought before him for hearing, there is another little matter to which he should first attend. He should ask the commissioners' court to call an election for

the issuance of bonds to build enough jails to take care of the overflow from the present bastile.

*What Is Contempt?*

The citation with which the Lookout was served is seven legal pages in length, complete with all the whereases. It quoted liberally from news stories appearing in The Caller-Times and from an editorial written by the Lookout in this column.

But boiled down to a simple statement of facts, in words about which there can be no misunderstanding, the situation is this:

The newspaper is accused of contempt because it published the proceedings of a trial in county court in which the [fol. 563] jury, which did not have access to the newspapers, repeatedly refused to obey the judge's instructions for a verdict in favor of the plaintiff. When it finally gave in, since it had no alternative, it added a notation that the verdict was reached in violation of the conscience of its members. In other words, the newspaper is accused of contempt because it printed the news. If that's contempt, the newspaper is guilty hundred- of times, 365 days out of the year.

The Lookout is accused of contempt, because he suggested that the county judge should be a lawyer, which Judge Browning isn't, since the county judge hears cases in which technical legal points are involved. If that is contempt, every member of the Nueces County Bar Association with whom the Lokout has discussed that question at some time or another is also in contempt.

*First Obligation*

Naturally, the Lookout doesn't believe that either he or The Caller-Times is in contempt of county or any other court, Judge Browning to the contrary notwithstanding. He has no personal interest in or feeling toward Judge Browning, the parties in the case which brought on this controversy or the attorneys engaged therein. He does feel strongly about the right of the people to be informed about what goes on in their court houses, city halls, their legislatures and their Congress. No efforts to cite for contempt of court can change or intimidate that feeling.

Personally, the Lookout would feel that he and The Caller-Times would be guilty of contempt of their obligation

to the people if we didn't print the news, if we didn't have the conscience to comment on the conduct of officials whose offices belong to the people. If he can't honor that obligation without being held in contempt of county court, then he will be held in contempt and go to jail and continue to champion the right of the people to be informed. What's the use of fighting for democratic principles, for freedom of speech, press, worship and assembly on the battlefields [fol. 564] and in international conference halls if we lose it in the county courthouse?

If the people know what's going on, they have little to fear from misguided politicians. Secrecy breeds tyranny and oppression. For the Lookout's part he will take his stand with the people and dare the politicians to do their worst.

Perhaps it is just as well that this has come about as it has. The politicians have to shoot their bolt every now and then to learn for themselves that they are the servants, not the masters, of the people.

This column is written for the Caller by Bob McCracken. Opinions expressed are those of the writer and do not necessarily reflect the policy of this newspaper.

Browning to Hear Retrial Motion in Mayes Case Today

Hearing on a defense motion for a new trial in the case of Bush M. Jackson et al. vs. Joe L. Mayes et al. is scheduled before Judge Joe D. Browning in Nueces County Court at 9:30 o'clock this morning.

The case involving a suit for forcible detainer, has attracted unusual attention because of sensational developments in the course of and as a result of its hearing.

The verdict from which appeal is being sought was handed down Sunday, May 27, when Judge Browning instructed the jury to decide for the plaintiff. Three times the jury ignored the judge's instructions to find for the defendant. When finally it complied with his order it appended a note that the verdict was contrary to the conscience of its members.

*Contempt Papers Served*

Reports of proceedings, and editorial comment in The Caller-Times, have caused the publisher, managing editor [fol. 565] and a reporter to be cited by Judge Browning for

contempt of court. Summons were served Monday night and yesterday on Conway C. Craig, publisher; Bob McCracken, managing editor, and Tom Mulvany, reporter. Craig left yesterday for Kerrville and Austin, but said he would return by Friday morning.

Craig is cited as publisher, Mulvany as the reporter who covered the trial, and McCracken for an editorial written in The Crow's Nest, a daily column in the Caller and The Caller-Times.

The suit is one in which Jackson, as agent for the owners of the Old Elks Building at Starr and Water Streets, sought to oust Mayes from his place of business known as the Playboy Cafe. Mayes is a private in the Army, having been drafted last January. Joined with Jackson as plaintiffs are Franklin Flato, Frederick Flato and Harry G. Heaney, while F. F. Burchard is defendant with Mayes.

*Service Group's Request*

Judge Browning's instruction for a verdict for the plaintiff was granted on a motion by Dudley Tarlton, attorney for the plaintiffs, without Tarlton being required to cite his authority and without giving Defense Attorneys Walter M. Lewright and LeGrand Woods an opportunity to argue. Previously a defense motion for an instructed verdict had been argued for 90 minutes.

Request that Judge Browning grant a new trial has been made by the Soldiers and Sailors Co-ncil, which also petitioned the judge to excuse himself and leave the issues to be tried before another judge and another jury. Another resolution dealing with conduct of the case was adopted yesterday by the Army Mothers' Club of Corpus Christi.

[fol. 566] From the Corpus Christi Times, June 6, 1945

Lewright Asks New Trial in Lease Forfeit

Mayes' Counsel Offers Argument in County Court

Walter M. Lewright, counsel for the defendant in the now famed forcible detainer suit of Bush M. Jackson, et al., vs. Joe L. Mayes for possession of the Playboy Cafe premises today stated before Judge Joe D. Browning in County Court that "this forfeiture stinks to the high heavens."

Lewright made this statement in his argument before Browning on a defense motion for a new trial, following

judgment entered for the plaintiff after the jury had been held overnight for 15 hours until it signed an instructed verdict on May 27.

"Your honor would never have ruled the way you did on Saturday a week ago," declared Lewright, "if I had had a chance to quote these authorities I have cited today.

*'Acted in Good Faith'*

"I am sure that your honor acted in good faith and I am equally sure you will act in good faith in applying these authorities to the instant case."

Quoting then from one of the more than 50-odd authorities he cited during his long argument to the court, he came to the statement:

"Forfeitures are odious."

"Listen to that, judge, odious. What does that mean? Odious means stinks. This forfeiture stinks to the high heavens. I don't believe the elder Mr. Flato and Harry Heaney knew about this action at all," he roared.

"But Bush Jackson and Doc Mason were lying behind the letter of the law, waiting for this poor boy in the service of his country, or his agent, to make a technical mistake to claim his lease by forfeit. It stinks."

[fol. 567] *Honestly Mistaken*

Continuing his argument, Lewright held that the forfeiture provision in lease contracts was for the purpose of enforcing payment and not to give the landlord an unfair advantage over the tenant.

"I don't want to get involved in any disputes your honor may have with any third party," the attorney continued, "and when I say this forfeiture stinks, I refer to the action of the plaintiffs. I believe your honor was honestly mistaken in his ruling in this case."

Lewright began his argument shortly after 10 a. m., and after LeGrand J. Woods, associate defense counsel, had opened for his side with what amounted to a summation of the arguments presented on May 26 on the defendants' motion for an instructed verdict.

*Tarlton Objects*

Woods stressed that from the testimony of Jackson and Mason, it was obvious that Mason should have been named

as a party plaintiff in the action, and held that the question of exercising an option was principally one of intention as shown by the tender of $250 by Floyd F. Burchard, agent for Mayes, on March 14, and the fact that improvements were made to the building in December.

Lewright opened his argument with a caustic reference to the fact that Dudley Tarlton, plaintiff counsel, was not required to present his position in open court on the plaintiffs' motion for a directed verdict, and the fact that there was no requirement for citation of authorities.

To these observations, Tarlton objected, asserting his motion of May 26 was prepared during the recess of the court and filed in writing, although the clerk was not present.

"I never heard of objection being presented during an argument on law," grumbled Lewright. "I assert no argu- [fol. 568] ment was presented as to his construction of the facts nor citation made of authorities.

"It was merely a formal motion—where is that one-page motion?" he continued turning to his associate.

*Reads From Motion*

"Now your honor, as a man—I don't know whether you're a lawyer or a member of the bar—but as a man I know your honor wants to do what the law provides be done. Therefore I want to present these authorities which I had prepared a week ago, to bring out the fact that your honor was in error in taking this case away from the jury and the fact that your honor erred in determining this case as a matter of law."

He read from Tarlton's brief motion for an instructed verdict—the first time it had been read during the trial or its subsequent hearings.

"Now, your honor, I don't assume I'm boring this court by going into the law on these issues," he stated, laying aside Tarlton's motion. "This case is important to this community; it's important to the jurisprudence of this court.

"If this man is to be booted out of these premises, there is no appeal from this court."

*Question of Fact*

He held in regular order that Browning was in error in taking each of the issues involved from the jury, since all revolved on questions of fact, not law.

In order he cited that the option made no provision how it was to be exercised and therefore whether it had been was a question of fact.

Second, Lewright held that Jackson had never held Mayes to a definite time of payment of his rent and that if the $275 required under the option was four days late this was a matter for the jury to decide.

[fol. 569] Third, he held that while Doc Mason and a Benjamin F. Vaughan denied Burchard had offered the added payment four days date, Burchard had testified to the contrary—another matter for the jury.

"The law doesn't require you to do the futile thing," he argued, accusing Jackson of lying behind the letter of the law to lay a tray for possession of the premises. "Bush Jackson didn't want the rent. He wanted the property for Doc Mason and the default in time is inconsequential under the law."

*For Jury To Decide*

Lewright maintained that if the tenant acted in good faith and the owner suffered no harm from the delay, there should be no forfeiture of lease.

Continuing his list of matters for the jury, he stated if there was a question of Burchard being honestly mistaken in his tender of rent, it was for the jury to decide.

If the delay was wilful, it was for the jury; if there were damages to the defendant as a result of the ouster, it was, for the jury, were among Lewright's other points.

"Did the defendants act in bad faith, in sending a check for $250 rent instead of $275?" he went on. "I don't believe anyone will believe they did, with this boy crawling on his belly at Camp Hood, getting ready to protect his country—but if he was in bad faith last December when he said he wanted to exercise his option, then this is a matter for the jury."

Lewright construed Burchard's dealings with Jackson and Vaughn last March as mistakes, but acts of good faith and held that the law protected him thereby from forfeiture.

*'The Law Is Fair'*

Equity relieves from forfeiture, Lewright continued, and the County Court is as much a court of equity as it is a court of law. "Why does equity relieve it? Because, [fol. 570] your honor, the law is just plain horse sense. The law protects the innocent and the unwary. The law is fair.

"In the instant case, it was unfair in law and equity to declare forfeiture on the defendant. And if your honor was not in error in instructing a verdict for the defense, then it was a matter for the jury to decide.

"We've shown you the law. I'm sure your honor will be guided by the law. I am sure you will see fit to grant our motion for a new trial and with your conscience and with God to look you right in the eye."

*Rests at Noon*

Throughout his argument, Lewright made several oblique references to Browning's status as a layman, or a student of law, or as a lawyer, and at one point he stressed: "Men learned in the law; men that have studied law; men who have gone through the universities and men who have been elected to the bench in the courts of this state have held that no forfeiture can ensue of the tenant shall have acted in good faith and the owner suffered no harm from the delay in paying rental."

He rested at noon and the court adjourned until 2:30 P.M., at which time Dudley Tarlton went on, his argument opening with the premise that there was no forfeiture of the lease at all, but that, instead, the lease ceased to exist as of March 14, midnight.

Also to be heard in argument for the plaintiff during the afternoon was Walter E. Koch, who tried the case against Woods when it first was heard in Justice of the Peace Carl W. Crow's room.

[fol. 571] *From the Corpus Christi Caller, June 7, 1945*

New Trial in Playboy Cafe Case Denied

Ruling by Browning Follows Day of Spirited Oratory

Judge Joe D. Browning, in a 61-word opinion handed down just before 6 o'clock last night, after four attorneys had argued for and against throughout the day, denied

a defense motion for a new trial in the ouster suit styled Bush M. Jackson, et al., vs. Joe L. Mayes, et al.

His ruling substantiates and makes final Judge Browning's instructed verdict of May 26, which a six-man jury twice reversed before signing it on May 27 after being locked together for 15 hours.

The opinion read:

"The sole issue is whether the defendant complied with the terms of the option. The evidence is undisputed that he did not, but that he tendered a check for $250 which was refused, and later tendered a check for $275, which was post-dated one month.

"This and other facts causes me to render a decision overruling the motion for a new trial."

*Tarlton Raps Press*

Highlight of the afternoon argument before the court was the indictment by Dudley Tarlton, counsel for Jackson, of the "propagandizing press" and the "studied propaganda being made to subvert administration of the courts of justice."

"An effort has been made," Tarlton continued, "to exercise the powers of government by the pressure of public opinion—or what we call the law of Judge Lynch.

"Pressure groups have been called upon and have expressed in language that would tend to subject the processes of the ordinary administration of justice to a propagandized public opinion.

"Have we come to this sorry pass in this country, where our sons are fighting on far-flung fronts to preserve the means of liberty and justice—have we come to this pass that our judges in the majesty of their jurisdiction are [fol. 572] to be imposed upon by declarations that criticize their actions?

"In this situation, your honor has been told in words too plain for contradiction that you must decide this issue according to the dictates and writings of others."

Tarlton did not make reference directly to the Caller-Times and its news stories and editorial comments since the conclusion of the trial, May 27, nor did he refer to the citation for contempt which named three individuals on the Caller-Times staff and which emanated from Browning's court, Tuesday.

But his associate counsel for the defense, Walter E. Koch, in the opening of his argument before the court, made his attack on these newspapers more specific.

"I was the atttorney for the plaintiff when this suit was tried in justice court early last month," Koch observed. "I was not here when the trial took place in county court—and I now am sorry that I missed it.

"It appears that in the trial before this court, the case was tried concurrently—before two tribunals. I practiced no chicanery in order to induce a verdict for the plaintiff in the justice court trial.

"But when I read the published account of the trial of this case in County Court on Sunday, May 27th, I felt like a villain. But after reading through that account, I observed that the concurrent court had excluded from its jury evidence that was material, indeed.

"I searched in vain for evidence of a second check, submitted by Mr. Burchard to Mr. Jackson on March 21, and which was post-dated."

Koch was referring to testimony adduced by Tarl on from Floyd F. Burchard, Mayes' agent after the latter was [fol. 573] drafted into the Army, last January, concerning a check Burchard mailed to Jackson on March 21.

Burchard's $250 rental check had been rejected on March 13, and on March 19, at a conference in the office of Benjamin F. Vaughan, in the Nixon Building, he was apprised of the fact that the option in the lease permitted renewal of occupancy for another 12 months upon payment of $275 monthly—a $25 increase.

After he had protested he had never seen the lease, nor been told of this provision, Burchard offered the additional $25 in Vaughan's office, but the offer was refused. Next day, he testified, his $250 check came back through the mail, and the following day he mailed a $275 check.

This check had a note across its top, "Rent of Playboy for April." It was dated—not March 21—but April 21. Burchard contended he wrote the date through oversight and that his first check was dated for March. The plaintiffs called this a "rubber check."

*Lewright Cites Authorities*

During the morning session Walter M. Lewright, chief defense counsel, cited cases and authorities to support his demand for a new trial.

Lewright termed the ouster of Mayes a forfeiture of his rights under the law. He quoted a high court opinion describing forfeitures as "odious."

"Listen to that, judge. Odious. What does that mean? Odious means it stinks. This forfeiture stinks to the high heavens," he said. "I don't believe the elder Mr. Flato or Harry Heaney knew about this action at all."

(Joined with Jackson in the suit were Franklin and Fred Flato and Harry Heaney.)

"But Bush Jackson and Doc Mason were lying behind the letter of the law, waiting for this poor boy in the service [fol. 574] of his country—or his agent—to make a technical mistake so that they could claim his lease by forfeit. It stinks."

Lewright cited each step in the evolution of evidence in the trial. Against each allegation of the plaintiffs, he aligned contradictory or explanatory evidence from the defense and held, in conclusion that virtually all the issues were questions of fact which the court should have left for the jury to decide.

Lewright sometimes swung over to cajolery of the court and he peppered his argument with several references to the court's knowledge of the law, asserting finally that the judge may or may not be a member of the bar but that the law was plain "horse sense."

*Tarlton Defends Browning*

Tarlton went to Browning's defense on this point in his afternoon argument.

"Although your honor does not possess a license to practice law," said Tarlton in his suave, deliberate diction, "you have, through long association and efforts and application, acquired a thorough knowledge of the law.

"No right-thinking man will countenance substitution of the judgment of this court for that of another."

Tarlton held the question was not one of forfeiture at all; that Mayes had terminated his lease when he failed to renew it in accordance with the conditions agreed upon.

He also declared this was not Mayes' principal business because he was an insurance agent.

If the situation were reversed, Tarlton said, and Mayes had tendered a $250 check and then found his business removed by local option, no court would support Jackson's efforts to compel him to pay the full $3,300 for the ensuing year.

He concluded by describing Browning as a man of conscientious devotion to duty who had been three times rewarded for his public service by being elected and reelected to office [fol. 575]—and with a parting shot at the Cailer-Times:

"Our cases must be decided in our courts—not in our newspapers."

Koch, after his preamble concerning the "concurrent court," devoted himself to a lengthy dissertation on the application of each authority he had cited in support of the plaintiff's legal position.

Lewright, in his rebuttal argument, cited a list of Texas cases to support his stand.

"It's out of the facts that the law arises," he declared.

He declared that the money was tendered for the rent, not for exercise of the option—which had been done in December—and that at all events, mere assent and occupany was proof of this exercise and that Jackson could have sued for his rent on March 15 under the option.

"Forget your newspaper articles, judge," he pleaded, "and let's decide this case according to law."

*Cites Texas Case*

He cited one Texas case where a defendant in similar circumstances was three months late in payment of rent.

"Did the judge instruct the jury in this instance?" he continued. "No, your honor, the judge submitted the issues to the jury.

"Don't let this judgment nisi that you've entered against third parties color your viewpoint," he urged. "Don't get Mayes and Burchard hooked up in this matter. Disregard Mr. Tarlton's arguments.

"I'm not making any appeal to your honor about public opinion. LeGrand Woods and I are trying to protect the legal rights of Joe Mayes.

"We're trying to show you that the jury had the right to review the facts in this case, and under the facts and the law

we have cited, the defense in this case, has the right to [fol. 576] go before the jury.

"And these facts are such that it would be unjust to the defendant to permit the forfeiture. It is out of the facts that the law arises.

"When your honor permits this matter to go before the jury, as we urge, nobody—Tarlton, Mason, the Veterans of Foreign Wars or anybody else—can criticize you for your action."

The clock showed 5:15 p. m. as Lewright sat down. Browning announced:

"The court will render its decision at 6 o'clock, gentlemen," and a few minutes before that hour he went back to the bench to read his brief, prepared statement.

[fol. 577] *From the Corpus Christi Caller, June 9, 1945*

The Crow's Nest

*On the Record*

The Lookout would be ungrateful if he didn't take this opportunity to voice appreciation for the many expressions of confidence and support that have come as a result of his citation for contempt of court by County Judge Joe D. Browning. The others cited with him join in the expression. It all serves to make The Caller-Times more conscious of its obligations to print the news and be fair in its comment and criticism.

The Lookout would like to publish the many letters the newspaper has received since the citations were issued. He may publish some of them later. But for the time being, until the contempt proceedings come up for hearing, he would prefer to do nothing that could be construed in any way as an effort to intimidate or coerce the court in the decision it will make.

Our fight is one for justice, for freedom of speech and press, for the dignity of all our courts. Our defense will be the official record of proceedings in the case of B. M. Jackson et al. vs. Joe Mayes et al. When the time comes we want the court to be in a position to render its decision according to law and the record. We appreciate the support of public opinion. It encourages our belief that we are in the right. But we intend to fight according to the rules.

*To the Finish*

Contempt proceedings originally were set for yesterday morning. They now have been delayed by our request until sometime in July.

Circumstance, not choice, dictated the delay. We would prefer to go to bat immediately. But records of the trial that occasioned the charge, official and complete, are essential to our case. The court reporter could not make our complete copy before the close today of the current term of county court.

[fol. 578] The term cannot be extended, according to law. Therefore it is necessary to carry over the hearing until the July term.

The issues involved in the contempt proceedings are entirely apart from the issues in the Mayes case. The fundamental principle of free speech and a free press are involved. It is our duty as well as our purpose to prove that the country judge, or any other public official, has no right to interfere with that freedom. Whatever the outcome, the final decision will be cited as authority in other such cases from time to time. The interest is nation-wide. We will carry it to the Supreme Court if necessary.

*Same Opinion*

As for the Mayes case, the Lookout's position is the same today as it was 10 days or so ago when he made the comment that got him cited for contempt.

He doesn't know whether the judge was correct or in error, according to law, in instructing the jury as he did and in refusing the motion for a new trial. Opinion among members of the local bar seems to be about as divided as public opinion on that question. Neither the Lookout nor The Caller-Times has any emotional interest one way or another in that particular case.

The Lookout doesn't suppose he ever will know whether the judge's decision was a proper one. He recognizes a judge's right to instruct a jury, and appreciates the reasons for that right. But at the same time he questions the ability of a judge who is not a lawyer to pass on the technical legal principles that underlie the basis for instructed verdicts. Judge Joe D. Browning, through no particular fault of his own, is not a lawyer. The law doesn't require him

to be. But that doesn't detract from the Lookout's conviction that the county judge, whoever he is, at lease should have a license to practice law, especially if he attempts to instruct a jury according to law.

[fol. 579] To satisfy his own curiosity, as well as that of the public, the Lookout still wishes that the county court were not the final authority in the Mayes case, that it could be heard before a district judge who is a member of the bar.

This column is written for the Caller by Bob McCracken. Opinions expressed are those of the writer and do not necessarily reflect the policy of this newspaper.

[fol. 580] IN COURT OF CRIMINAL APPEALS OF TEXAS

Ex parte CONWAY C. CRAIG, No. 23,232
ExParte BOB McCRACKEN, No. 23,233
Ex Parte TOM MULVANEY, No. 23,234

Appeal from Nueces County

OPINION—February 13, 1946

This is an original application to the Court for the writ of habeas corpus, by which relators seek to be discharged from custody and imprisonment under a contempt judgment.

At all times hereinafter mentioned, "The Corpus Christi Caller" and "The Corpus Christi Times" were newspapers published respectively the morning and afternoon of each day except Sunday in the City of Corpus Christi, Nueces County, Texas. The two papers published each Sunday a combined edition known as "The Corpus Christi Caller Times". Said newspapers were under the same ownership and management. Relator Conway C. Craig is the publisher and directing head thereof. Relator Bob McCracken is the managing editor and the writer of a column therein known as "The Crow's Nest". Relator Tom Mulvaney is a news writer and reporter therefor.

On August 9, 1945, after notice and hearing, the relators were each adjudged to be guilty of constructive contempt by the County Court of Nueces County, by reason of publications appearing in the above-named newspapers relative to a suit pending in said court and were condemned to confinement in jail for three days. Said judgments of

contempt become final, from which no appeal is authorized.

Relators each applied to this Court for the writ of habeas corpus alleging in the main that the judgment was void and unenforcible because it was in contravention of the due process and freedom of the press provisions of our State and Federal Constitutions. It was by reason of the particular conditions thus existing that we granted the writs.

It is made to affirmatively appear that if the contempt judgment is valid as to any one of the relators, it is valid as to all; and if invalid as to either, it is such as to all. [fol. 581] For this reason the three cases have been here consolidated, and are disposed of together.

On May 25, 1945, the case of Jackson v. Mayes proceeded to trial in the County Court of Nueces County before a jury, with the Honorable Joe D. Browning, Judge of said Court, presiding.

The proceeding was one of forcible entry and detainer, whereby Jackson sought to regain possession of a business building in the City of Corpus Christi which, he claimed, Mayes was unlawfully detaining from him.

The pivotal issue in the case was whether Mayes lease of the building had expired because of non-payment of rentals, as contracted. Mayes was a member of the armed forces of this country and his business was handled by Burchard, as agent. At the close of the testimony in the case, each party presented a motion for an instructed verdict. That of the plaintiff was granted, and Judge Browning instructed the jury to return a verdict for Jackson. The jury refused to follow Judge Browning's instruction but, to the contrary, attempt to return into court a verdict for Mayes. Judge Browning refused to accept such verdict and again instructed the jury to return a verdict for Jackson. The matter just referred to occurred Saturday evening, May 26, 1945. It was not until Sunday morning following that the jury, after having been admonished by counsel for Mayes, returned the verdict as instructed, and even then noted on the verdict that they had been coerced into so doing. Judgment was duly entered upon the verdict for Jackson.

On May 29, 1945, Mayes, through his counsel, filed a motion for a new trial, which was, on the 6th day of June, 1945, in all things overruled.

On June 4, 1945, after the rendition of the verdict and while M. es' motion for new trial was pending, one Newt Wright, who, as an officer of the County Court of Nueces County, filed in said court, addressed to the judge thereof, a complaint in writing by and through which he charged that the relators were guilty of constructive contempt of [fol. 582] said court by reason of the publication by them of certain publications in the newspapers heretofore mentioned. The allegations of the complaint and the publications referred to therein are as follows, that:

"On the 26th day of May, 1945, in the Corpus Christi Caller, there was published a purported news story which included the statement that,

> " 'Burchard further claimed that although he had not known of the option clause, when he learned of it he immediately proffered a check for $275.00 rental.'

"On the 27th day of May, 1945, in the Corpus Christi Caller-Times, there was written, published and circulated a purported news story of proceedings had that included the following statement:

> " 'At 7 P. M. Browning, without listening to argument from counsel for either side on a plaintiff's motion presented by Dudley Tarlton for Jackson, and without giving the six-man jury opportunity to weigh the evidence, instructed the jury to find against Mayes. W. M. Lewright, Mayes' attorney, protested that the court's arbitrary action had ruled that Tarlton's "one-page motion" did not need supporting argument and citation of authorities.'

"On the 28th day of May, 1945, there was written, published and circulated in the Corpus Christi Caller an article which contained the following language:

> " 'Browning accepted Tarlton's one-page motion, and without permitting argument or citation of authorities to support the motion, ruled that it be granted.' The effect of this ruling was that Browning took the matter from the jury.'

"The said article also included the following speech made by Walter Lewright, of counsel for the defendants:

"'However I now advise you that under the law, Judge Browning has the right to compel you, even against the dictates of your conscience, to sign the verdict he has ordered.

"'As a matter of fact, it is probable that he has the power to put you in jail until such time as you do sign it, and I rather imagine, from what has heretofore taken place, in this trial, that unless you do sign the verdict, he will cause you to be put in jail.

"'As I and my clients feel that you have done all in your power to register your protest and revulsion of feeling at the *affect* of this decision reached by Judge Browning; as you are helpless to do anything further; and as making you suffer by remaining locked up will not do us a bit of good, I suggest that you sign the [fol. 583] verdict and return to your homes with a clear conscience of having done all that you could to protect the rights of the man whom I feel, and evidently you feel, has been done a gross injustice.

"'While we have no appeal from the court's decision in this case, we do have the right again to appeal to his conscience by presenting a motion for new trial in this action—and which motion we will file and argue strenuously with the hope that in the meantime he will see the error committed and will rectify the same.

"'There cannot be any doubt but that the action of you men in registering your protest against this decision, as you have done, will affect him. At least, I can only hope that it will. I sincerely thank you.'

"On the 30th day of May, 1945, in an article written by the aforesaid Bob McCracken, and published and circulated in the Corpus Christi Caller under the editorial masthead, the Crow's Nest, there was contained the following language:

"'Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such going

on, especially when a man in the service of his country seems to be getting a raw deal.'

"And further:

"'Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a chance to argue against it.

"'That was the travesty on justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high-handed procedure in instructing a jury. It's no wonder that the jury balked and public opinion is outraged.

"'The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where the fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances, a competent layman would be better qualified, but the county judge's office is an exception. He should be a competent attorney as well as a competent businessman.

"'It's the tragedy in a case of this sort that the court where the controversial decision was handed down is the court of last resort. It's too bad that appeal can't be made to a district court and heard by a judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly.'

[fol. 584] "And further:

"'There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated.'

"On the same 30th day of May, 1945, in the same issue of the Corpus Christi Caller, there appeared what purported to be a report of action taken by the Sailors and

Soldiers Advisory Council of Corpus Christi, the said action reported to have been the passage of a resolution:

"'Labeling County Judge Joe D. Browning's order for a directed verdict against Mayes a "gross miscarriage of justice".'

"The said article further states that:

"'The council's resolution called on Browning to grant Mayes a new trial on the grounds that he had committed an error in instructing the jury to find for the plaintiff. The petition asked that Browning, upon granting the new trial, should disqualify himself to further sit as Judge in the case, and should permit the case to be retried before another judge and jury.'

"And further:

"'The trial reached a climax Saturday night when Browning, on motion of Dudley Tarlton, Jackson's counsel, and without argument or citation of authorities, instructed the six-man County Court to find for Jackson. The jury twice refused, both times bringing in verdicts in favor of Mayes and against Jackson. Browning had the jury confined to the court house jury room all Saturday night. Sunday morning, when the court convened, the jury reported that it still had not signed the verdict in favor of Jackson. Browning announced that he would lock the jury up until Monday morning. However, Walter M. Lewright advised the jurymen that they should not continue to "suffer" any longer, and should sign the verdict, since Browning had a legal right to force them to do so. The jury signed the verdict, but appended a statement asserting that they did so under pressure.'

"On the 31st day of May, 1945, there was written, published and circulated by the persons aforesaid in Corpus Christi Caller a purported news story, which said:

"'Three local groups were reported to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy Cafe ouster suit.

"'One petition is reportedly being drawn by a parents teachers' group, another by a service mother's

group, and the third is being drawn for independent circulation among parents of men in service.

[fol. 585] "'The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi Soldier's and Sailors Advisory Council Tuesday night. This petition called on Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under another judge and jury. Action on the petitions is expected shortly.

"'The council's petition, drawn up by five veteran's organizations with a membership of more than 1,000 followed by a few hours the filing of a motion for a new trial by Walter M. Lewright and LeGrand Woods, Mayes' counsels.'

"The article also contained the following language:

"'It came to a climax Sunday when Browning Saturday night accepted without argument or citation of authority a motion by Dudley Tarlton, Jackson's lawyer, for an instructed verdict.'

"The same article said further:

"'The jury was kept Saturday night in the courthouse. Sunday morning, following a threat by Browning to keep the jury together until they did sign, the jurymen signed the verdict, appending a statement that they did so against the dictates of their conscience.'"

Various reasons were assigned whereby it was claimed that the articles mentioned constituted contempt of court, none of which we discuss save and except that which charges that the articles when taken together and considered as a whole "were calculated and intended to falsely present to the public the nature of the proceedings had and to compel a different result on the hearing of the motion for a new trial" and to "prejudice and influence the court in its ruling on the aforesaid motion for a new trial * * * and were made at a time and under circumstances calculated to affect the force of justice in said proceedings * * *."

Upon consideration of this complaint and on the same day of its filing, Judge Browning caused to be entered a judgment nisi in which he found that the relators had published the statements alleged and that said publications were con-

tinuous and calculated to bring about the evil, as charged, as a consequence of which the relators were adjudged to be in contempt of court, and the punishment of each was fixed at three days' confinement in jail. An order was incorporated therein, commanding relators to appear at a future date to show cause why the judgment nisi should not be made final. The procedure employed was authorized. 9 [fol. 586] Tex. Jur., p. 623, sec. 37. No attack is here made thereon.

The judgment nisi, after a full hearing, was made final on August 9, 1945.

Upon that hearing, the relators each appeared and answered to the complaint, in which they asserted—among other things—that the publications relied upon were insufficient to warrant a judgment of contempt in that, when considered together and with all other publications relating to the same subject, they "present no clear and present danger" to the overthrow of judicial impartiality or the administration of impartial justice at the hands of a judge possessed of a mind of reasonable fortitude; that any judgment of contempt or summary punishment imposed by reason thereof would be in contravention of freedom of the press and speech as guaranted by Art. 1, sec. 8, of the Constitution of Texas, and a denial of due process as guaranteed by our Federal and State Constitutions.

There was also a denial of any intent to reflect upon, prejudice, scandalize, or bring into disrepute, the court.

In addition to the answer, Relator McCracken presented to the court the following statement, viz:

> "Your Honor, we have had a conference, the three of us, and we have prepared this statement, or rather I have prepared it, and I would like to read it. (Reads)
>
> "'I can speak only for myself. Without knowing the meaning of purging a contempt, especially in a case of this kind, and not being guilty of any contempt as I concede, I can only say this:
>
> "'I think that the impression created upon the mind of the public by all that was said in our papers about the Jackson-Mayes trial was the same impression that would have been created upon the mind of an average intelligent layman who sat through the trial.
>
> "'It was the same impression that would have been created if the entire proceedings could have been pub-

lished. In saying this, I do not impute unworthy motives to anyone; I do not undertake to judge motives.

"'Moreover, I do not profess to know or presume to advise how the case should have been finally decided.

"'It was my hope that the Crow's Nest published in the papers would quicken the conscience of the judge. [fol. 587] * * * I wanted him to search his conscience. It was my hope that what I said would make him more careful in discharging his duty. I think my column was calculated to have that effect upon a consientious judge.

"'As I saw it then, and as I see it now, the statements in the papers could not have the effect of overthrowing the will or undermining the conscience of the judge. They could have no such effect upon any judge worthy of the name. I assumed that the judge would understand that he, and he alone, would have to decide the law as he understood it.

"'I would not bring our courts into disrepute. Indeed, in the long run, their standing before the bar of public opinion is determined by the courts—and by them alone—but I would do what I can to help them always to perform their high and solemn duties.

"'If, in this instance, I have gone about it in a way that has needlessly wounded sensibilities, I am sorry for that, but I do not concede that anything that I have done gives your honor license to punish me for it.'"

Relators Craig and Mulvaney each concurred in and adopted McCracken's statement.

The statement reflects the intent and mind of the publishers. It speaks for itself. Neither the answer nor statement of relators charge, impute, or suggest any unworthy motive on the part of Judge Browning prompting him in his decision or action. It is insisted that when the editorials and newspaper articles are considered together, it was the purpose and intent thereof to force Judge Browning to grant Mayes a new trial in the case. In support thereof, attention is called to the fact that on Monday, May 28, 1945—the next day after the jury had returned the verdict in accordance with the instruction—the speech of Mayes' counsel was published, in which counsel stated that a motion for a new trial would be filed and argued strenuously "with the hope that in the mean-

time he (Judge Browning) will see the error committed and will rectify the same."

The motion for new trial was filed the next day, May 29, 1945. Then on May 30, 1945, an editorial appeared wherein Judge Browning's action in instructing the verdict for Jackson and against Mayes, without hearing "both sides", was criticised as being a "travesty on justice" and "high handed"; as having properly brought "public opinion [fol. 588] down on his head"; as having "outraged public opinion"; as being "a tragedy" that the case could not be appealed to another court and tried before a judge who was "able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly"; and as being a consequent repudiation of the "first rule of justice." The editorial further stated that "there is no way of knowing whether justice was done."

On the same day, in the same issue of the paper where the above editorial appeared, and in connection therewith, there was published the account of the adoption of a resolution by the Sailors' and Soldiers' Advisory Council of Corpus Christi, which labeled Judge Browning's action in instructing the verdict for Jackson as a "gross miscarriage of justice" and which resolution called upon Judge Browning to grant a new trial and to disqualify himself to further sit as a judge in the case "and to permit the case to be retried by another judge and jury."

The next day, or May 31, 1945, a news item was published, calling attention to the fact that three local groups were reported preparing petitions asking Judge Browning to grant the motion for new trial and then to disqualify himself so another judge might try the case.

Do such publications authorize the contempt judgment?

We have no statute in this State defining as contempt the facts alleged in the complaint. Our courts are relegated, then, to their inherent power—or power at common law—to punish for such alleged contempt. The rule controlling in Texas has long been that "the publication of matter having reference to a pending suit, which is defamatory and calculated in its nature to obstruct and impede the administration of justice and to embarrass the judge in the trial of the pending action, constitutes contempt of court." 9 Tex. Jur., p. 584, sec. 4; Ex Parte West, 60 Tex. Cr. R. 485, 132 S. W. 339; Ex Parte Green, 46 Tex. Cr. R. 576, 81 S. W. 723.

[fol. 589] In Ex Parte West, supra, we said:

> "* * * If the court be scandalized, its motives or integrity impugned in regard to official conduct, the consequences cannot but be baneful, the administration of the law embarrassed and impeded, the rights of parties endangered, and a calm and dispassionate discussion and investigation or causes prevented."

The rule stated is what is known as the "reasonably calculated rule," which is that publications made during and having reference to a pending suit which are reasonably calculated to obstruct the due and orderly administration of justice in that case constitute constructive contempt of court. The same rule is recognized in other jurisdictions under what is known as the "inherent tendency" and "reasonable tendency" rule. See 6, R. C. L., P. 508-9, Secs. 20 and 21; 12 Am. Jur., p. 412, Sec. 31; 17 C. J. S., p. 41, Sec. 30. See also Toledo Newspaper Co. v. United States, 247 U. S. 402, 62 L. Ed. 1186, 38 S. Ct. 560.

The right of the press to bring to public notice the acts, conduct and decisions of judges and courts and to comment freely and fairly thereon is not only its privilege but duty. There is nothing sacred about the courts or the judges thereof. They are open to criticism for their acts, as are all other officials. Such is the right guaranteed by our State and Federal Constitutions of freedom of the press and speech. But when newspaper publications are made during the pending of a case in court and reach the point of interfering with the due administration of justice in the courts of this State, they cease to be protected by those constitutional guarantees. Liberty of the press and freedom of expression must not be confused with license or abuse of that liberty.

As sustaining the views just expressed, we call attention to the case of Craig v. Hecht, 263 U. S. 255, 44 S. Ct. 103, 68 L. Ed. 293, wherein Chief Justice Taft said:

> "It is of primary importance that the right freely to coment on and criticize the action, opinions, and judgment of courts and judges should be preserved inviolate; but it is also essential that courts and judges should not be impeded in the conduct of judicial busi-
> [fol. 590] ness by publications having the direct tendency and effect of obstructing the enforcement of their

orders and judgment or of impairing the justice and impartiality of verdicts.

"If the publication criticizes the judge or court after the matter with which the criticism has to do has been finally adjudicated and the proceedings are ended, so that the carrying out of the court's judgment cannot be thereby obstructed, the publication is not contempt and cannot be summarily punished by the court; however false, malicious or unjust it may be. The remedy of the judge as an individual is by action or prosecution for libel. If, however, the publication is intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the rendition of an impartial verdict, or in carrying out its orders and judgment, the court may, and it is its duty to, protect the administration of justice by punishment of the offender for contempt."

Freedom of the press is one thing. The due administration of justice in the courts is another. We have *do* difficulty in arriving at the conclusion that, as between the two, liberty of the press is and must be subservient and inferior to that of due administration of justice in the courts. Such conclusion is made manifest by reason of the fact that it is only through the courts that protection and enjoyment of the liberties guaranteed under our Bill of Rights can be made safe and secure. It is the courts that protect one in the enjoyment of liberties guaranteed under our Constitution.

It becomes material to know the meaning of "due administration of justice," as applied to the instant case.

The County Court of Nueces County is a court of record, made so by Art. 5, sec. 15, Texas Constitution. This section also prescribes the legal qualifications of the judge as "one well informed in the law of the State." The Legislature not having attempted by statute to make more specific the meaning of that phrase, it follows that a county judge is not required to be one licensed to practice law in this State. So, under our Constitution, the people, in electing one to the office of County Judge, determine his right to hold that high office.

It is also the law in this State that in a forcible entry and detainer case, the judgment of the county court is final. [fol. 591] No appeal is allowed, Art. 3992, R. C. S. The

constitutionality of that statute has been affirmed by the Supreme Court of this State. Beacon Lumber Co. v. Brown, 14 S. W. (2) 1022. The right of appeal is not a prerequisite to due process, as guaranteed by our Constitutions. Lackenbatch v. U. S., 272 U. S. 533, 71 L. Ed. 394.

It follows, then, that the County Court of Nueces County had jurisdiction of the forcible entry and detainer suit. Judge Browning was the judge thereof whose duty it was to preside in the trial of that case and to determine the questions of law arising in that controversy.

If, in the performance of that duty, Judge Browning reached the conclusion—based solely upon his understanding and interpretation of the law—that the jury should be instructed to return a verdict for Jackson, it was his clear duty to do so. In so doing, his judgment was the due administration of justice, under the Constitution and laws of this State, *in* that case. The correctness of Judge Browning's decision, under such circumstances and limitations, was not subject to review by any other court.

Relators do not challenge the finality of the judgment in the forcible entry and detainer suit but press upon us, as they did in the contempt hearing, that it was a good and sufficient defense to the accusation of contempt to show that Judge Browning's action in instructing the jury as he did was neither warranted nor authorized under the law of facts in that case but was against both the law and the facts. In other words, relators say that, as a defense to the contempt charge, they were authorized to show and sustain the truth of their publications—that is, that justice had not thereby been done. In support of that defensive theory, they bring before this court a statement of the facts adduced upon the trial of the forcible entry and detainer case. As authorizing such defense, relators cite the case of Ex Parte Green, supra, wherein is found the statement, viz.:

> [fol. 592] "As stated above, we gather from the current of authorities, both those cited and others, that there can be no constructive contempts of court with reference to publications reflecting on the court or the judge thereof, unless the publication is not only of a defamatory character, but is untrue, and, in addition thereto, relates to some particular case then pending, and is calculated to embarrass the court in the trial or disposition thereof."

The contempt relied upon in the Green case, supra, did not relate to a case pending in court. This distinguishes that case from the instant case. It cannot be said, then, that the Green case, supra, furnishes a precedent for our guidance here. To the contrary, the controlling rule to be applied in cases of contempt alleged to have been committed by publications during the pendency of a case in court and relating thereto, is that it is no defense that the publications were true.

Such conclusion is supported, directly, by the case of Patterson v. Colorado, 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556, wherein Justice Holmes said:

> "A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice because even a correct conclusion is not to be reacheed or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and arguments in open court, and not by outside influence, whether of private talk or public print."

See also 6 R. C. L., p. 508, sec. 20, wherein the rule is announced to be:

> "* * * The truthfulness of an article published during judicial proceedings constitutes no excuse, and does not relieve the author thereof from liability for contempt, when the article tends to impede, embarrass, or obstruct the administration of justice."

In addition to the authorities there cited, see Dale v. State, 150 N. E. 781, 49 A. L. R. 647.

Perhaps a more conclusive reason why relators were not entitled to show as a defense that Judge Browning's decision was incorrect lies in the fact that no appeal was authorized therefrom in order that some other court might review his action. If we were to allow that defense here, [fol. 593] we should review that ruling in direct opposition to the statute. The issue before us is not whether Judge Browning's ruling was correct or incorrect, but whether the publications relating thereto were reasonably calcu-

lated to interfere with the due administration of justice in that case.

It is contended by relators that the Fourteenth Amendment to the Federal Constitution applies to the States the same standard relative to freedom of press and speech as under the First Amendment are applicable to the Federal government; that, by reason thereof, the Supreme Court of the United States has jurisdiction to review contempt judgments of State courts; also that in such cases and in determining the validity of such judgments, the Supreme Court of the United States has announced as the controlling one a rule more stringent against the judgment of the State court and more favorable to the constitutional guarantee of freedom of the press, than that recognized by this court.

It is insisted that the case of Bridges v. California, 314 U. S. 252, 86 L. Ed. 192, 62 S. Ct. 190, so holds and that this case should be decided by us upon the basis of that decision and the rules announced therein. That case, as here, was a test of the validity of common law judgments of contempt by a State court, claimed to be in violation of due process.

There is no question but that, as contended by relators under the Bridges case, following that of Gitlow v. New York, 268 U. S. 652, 69 L. Ed. 1138, 45 S. Ct. 625, the Supreme Court has taken jurisdiction of cases of this character and has repudiated, as being insufficient, the "reasonably calculated", "inherent tendency", and "reasonable tendency" rules heretofore mentioned, and announces the correct rule to be that known as the "clear and present danger" where the substantive evil is "extremely serious" and the degree of "imminence extremely high."

It becomes necessary, then, to analyze the holding in the Bridges case, and if applicable and controlling, to follow it.

[fol. 594] As is usually the case when the Supreme Court reviews judgments of State courts alleged to be in contravention of the guarantees of the Fourteenth Amendment, the Bridges case turned upon the facts of that particular case, as determined by the Supreme Court from its independent examination. That case, then, is a precedent only in cases involving similar fact situations.

The Bridges case was a consolidation of two cases—one involving editorials appearing in "The Los Angeles Times"

and the other, a publication in the form of a telegram by Bridges.

See: Times-Mirror Co. v. Superior Court, 15 Cal. (2d) 109, 98 P. (2d) 1029; and Bridges v. Superior Court, 14 Cal. (2d) 488, 94 P. (2d) 983.

In the Times-Mirror case involving newspaper publications, three editorials were relied upon and formed the basis of the judgment of contempt. These editorials had reference to a criminal case pending in the courts of the State of California. Two of these editorials were published after a conviction had resulted in the case and before sentence had ben passed by the trial judge. The third was published while there was pending the application of two of the defendants for probation under the conviction. The telegram publication was made while a motion for new trial was pending in a civil case—an injunction proceeding. The judgment of contempt in each of the cases was affirmed by the Supreme Court of California, upon and application of the rule of "inherent tendency" and "reasonable tendency" of interference with the orderly and due administration of justice in a pending case. See Times-Mirror Co. v. Superior Court, supra, and Bridges v. Superior Court, supra.

In the Times-Mirror case, only the editorial having reference to the application for probation was given definite consideration by the Supreme Court of the United States. It is copied below: (1)

The part of the editorial which reads: "*Judge A. F. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill*", had direct [fol. 595] reference to a matter then pending before the judge for his decision and suggested the disposition that should be made thereof.

In holding the editorial and the particular part quoted above to be insufficient to support the judgment of contempt, the Supreme Court said:

> "From the indications in the record of the position taken by the Los Angeles *Times* on labor controversies in the past, there could have been little doubt of its attitude toward the probation of Shannon and Holmes. In view of the paper's long-continued militancy in this field, it is inconceivable that any judge in Los Angeles

would expect anything but adverse criticism from it in the event probation were granted. Yet such criticism after final disposition of the proceedings would clearly have been privileged. Hence, this editorial, given the most intimidating construction it will bear, did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of the pending cases. To regard it, therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise."

We con-true this holding in the Bridges case to announce the rule that a newspaper editorial which does nothing more than threaten adverse criticism of a judge, should he act favorably on a pending application for probation by one under conviction for crime, will not authorize a common law judgment of contempt against the publisher of that editorial where such adverse criticism of the publisher, because of his long-continued and well-known adverse attitude toward the controversy out of which the conviction resulted, was reasonably to be expected by the judge.

We pass now to a consideration of the telegram which Bridges published. It is copied below: (2)

The publication was made pending a motion for new trial in an injunction controversy involving two labor unions. Bridges was directly connected with and interested in the union against which judgment had been entered and which was sought to be set aside by the motion for new trial. The contempt judgment against Bridges was not based upon the use of the word "outrageous," in referring to the entry of the injunction, but upon that part of the telegram which threatened that a strike would be called if the injunction [fol. 596] should be enforced. In other words, a strike was threatened unless the motion for new trial was granted. The Supreme Court of California affirmed the judgment, applying the "reasonable tendency" rule.

The conclusion by the Supreme Court of the United States that a publication of such threat was insufficient to support the contempt judgment was based upon the fact that the trial judge—from all the surrounding facts and circumstances—was necessarily charged with notice that a strike would probably result if he overruled the motion for new

trial and, by reason thereof, the published threat added nothing to what he already knew and therefore could not have had any substantial influence upon his action.

From the Bridges case there emerges, then, the rule—as we understand it—that State courts are authorized, under their inherent or common law power, to inflict summary punishment for contempt of court upon the publisher of newspaper articles and editorials concerning and relating to a case then pending before the court, only when the language of the publication is used under such circumstances and conditions and are of such a nature as to create a clear and present danger that the due and orderly administration of justice in that case will be obstructed. The likelihood of bringing about that evil must be extremely serious and the degree of imminence extremely high—the question of that likelihood being one of proximity and degree.

It follows that the "reasonably calculated" rule recognized by this Court appears not to be sufficient under the Bridges case. The Bridges case differs primarily from the instant case in the fact that there the question of whether the publications were contemptuous turned upon the fact that they carried threats of future adverse criticism and action on the part of the publishers in the event the disposition made in the case was not in keeping with the views of the publisher, and which threat of adverse criticism and action was reasonably to be expected by the judge because [fol. 597] of the long-continued and well-known attitude of the publishers toward the matter then pending before the court for determination.

No threats are involved in the instant publications. The case pending before the court was of consequence only to the litigants. The public, as such, had no interest in the outcome of that litigation. The publishers had no personal interest therein, nor was there any prior adverse feeling or attitude on their part toward Judge Browning or Jackson, the party prevailing under Judge Browning's ruling.

These fact elements distinguish the Bridges case, supra, from the instant case and render it uncontrolling, here, on the facts. However, the rule of "clear and present danger," as announced in the Bridges case, supra, is controlling here. It is in the light of that rule, then, that we are ultimately to decide this case.

When the several publications in the instant case are considered together and in their chronological order of appearance, there is no escape from the conclusion that it was the purpose and intent of the publishers thereof to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint, Judge Browning was wrong and they took it upon themselves to make him change his decision. To accomplish that end, Judge Browning's action in instructing the jury, without hearing argument on the motion, was editorially denounced as a "travesty on justice" and "high handed;" as properly bringing "public opinion down on his head;" as outraging "public opinion;" as a "tragedy" that the case could not be appealed to another judge who was "able to interpret and weigh motions and arguments of opposing counsel and to make his decisions accordingly;" and as a repudiation of the "first rule of justice," as a con-[fol. 598] sequence of which "there is no way of knowing whether justice was done."

Following, and in connection with, the editorials, news items were published showing that a certain group of citizens had passed a resolution denouncing the decision as a "gross miscarriage of justice." Other news items followed, showing that three different groups of citizens were petitioning or circulating petitions calling on Judge Browning to grant Mayes a new trial in the case and to "permit the case to be re-tried by another judge"—all to show that by reason of the attitude of the publishers toward Judge Browning's ruling and decision, as reflected in the editorials, public opinion had become aroused and was demanding that a new trial be granted in the case because, in agreement with the viewpoint of the publishers, Judge Browning's ruling was wrong.

It is hard to conceive how the public press could have been more forcibly or substantially used or applied to make, force, and compel a judge to change a ruling or decision in a case pending before him than was here done. The publications were not only reasonably calculated to accomplish that purpose but there was also a "clear and present danger" that they would and the likelihood that such result would follow was "extremely serious" and the degree of "imminence extremely high."

Such conclusions are made manifest because the publications and their purpose were to impress upon Judge Browning (a) that unless he granted the motion for a new trial he would be subjected to suspicion as to his integrity and fairness and to odium and hatred in the public mind; (b) that the safe and secure course to avoid the criticism of the press and public opinion would be to grant the motion and disqualify himself from again presiding at the trial of the case; and (c) that if he overruled the motion for a new trial, there would be produced in the public mind such a disregard for the court over which he presided as to give rise to a purpose in practice to refuse to respect and obey any order, judgment, or decree which he might render in conflict with the views of the public press.

[fol. 598a] In their answer, as well as written statement, relators denied any intent to reflect upon, prejudice, scandalize, or bring the court into disrepute.

Whether the publications constituted contempt of court is to be determined by the content thereof and the circumstances under which they were published. Moreover, relators do not take the position that the publications were not intended to force Judge Browning to grant the new trial, wherein lay the charge of contempt of court. The language of the statement by relators, "It was my hope that what I said would make him more careful in discharging his duty", indicates that such was their intent and purpose and motive.

It must be remembered that the only duty devolving upon Judge Browning at the time of the publications was to pass upon the motion for new trial.

The fact that Judge Browning subsequently overruled the motion for new trial could not inure to the benefit of the relators. The success or failure of the attempt to influence a court in the disposition of a case pending before him is not the test of liability to a charge of contempt. 12 Am. Jur., p. 417, sec. 37.

When Jackson presented his suit in the County Court of Nueces County against Mayes, he was entitled to have the rights which he asserted therein determined in that court in accordance with the law and not public opinion, private talk, or public print.

Under our system of government and applicable laws of this State, Judge Browning, and he alone, was to determine the issues of law arising in the forcible entry and

detainer case, which, when so determined by him, became the law of the case. If that system is to be changed, the Legislature must do it, not the courts.

From what has been said, the conclusion is expressed that the publications warranted Judge Browning in holding relators in contempt of court, under the decisions of this Court and of the Supreme Court of the United States. [fol. 599] The relief prayed for is denied, and relators are remanded to the custody of the arresting officer.

Davidson, Judge.

(Delivered February 13, 1946.)

The foregoing opinion of the Commission of Appeals has been examined by the Judges of the Court of Criminal Appeals and approved by a majority of the court.

(Signed) F. L. Hawkins, Presiding Judge.
(Signed) H. N. Graves, Judge.

(1) 86 L. Ed., p. 208:

"The whole editorial, published in The Los Angeles Times of May 5, 1938, was as follows:

"'Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of Assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are "first offenders", or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"'Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"'It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their "duty" would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill.'"

(2) 86 L. Ed., p. 210:

"The portions of the telegram published in newspapers of general circulation in San Francisco and Los Angeles on January 24 and 25, 1938, were as follows:

[fol. 600] "'This decision is outrageous considering L. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen Union has 3,000. International Longshoremen-Warehousemen Union has petitioned the Labor Board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending; attempted enforcement of Schmidt decision will tie-up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board.'"

[fol. 601] In Court of Criminal Appeals of Texas

Ex Parte Conway C. Craig, No. 23,232

Ex Parte Bob McCracken, No. 23,233

Ex Parte Tom Mulvaney, No. 23,234

Appeal from Nueces County

Dissenting Opinion—February 13, 1946

The majority opinion is conspicuously clear, concise and conclusive. We have no difficulty in understanding the extent to which this holding goes. We agree that the judgment finds the parties guilty of "constructive contempt;" that upon filing of a complaint, and without hearing, a judgment nisi was entered finding them guilty as charged in the complaint and directing them "to appear at a future date to show cause why the judgment nisi should not be made final." It is correct that "the judgment nisi, after a full hearing, was made final on August 9, 1945." We cannot agree that this was a proper procedure. It is directly in conflict with the Supreme Court of our State as well as our own Court: Ex parte Ratliff, 3 S. W. (2) 406; Ex parte Ireland, 38 Tex. 351; Ex parte Testard, 106 S. W. 319; Ex parte Lipscomb, 239 S. W. 1101; Ex parte Kilgore, 3 Tex. App. 247; Ex parte Foster, 71 S. W. 594; Ex parte Landry, 144 S. W. 962; Ex parte Duncan, 182 S. W. 313; Ex parte O'Fiel, 246 S. W. 664; and many others.

Judge Greenwood, speaking for the Supreme Court of our State in Ex parte Ratliff, supra, considers a case in which Ratliff had come into court and made a false statement about having sold and transferred some notes prior to the entry of an order restraining him from doing so. The judge found the sworn answer which he had filed to be untrue and summarily entered his judgment of contempt. After an exhaustive discussion of the authorities pertinent to the question, the opinion says: "The judgment is a nullity under a long and unbroken line of decisions of both the Supreme Court and the Court of Criminal Appeals." As authority he cited the foregoing cases, all of which have been examined and considered by the writer. The opinion concludes: "The judgment of the district court is void because it undertakes to deprive relator of his property [fol. 602] and liberty without due process of law, as guaran-

teed to him by section 19 of article 1 of the Bill of Rights in the Constitution of Texas, and by the Fifth Amendment to the Constitution of the United States."

We have also given attention to a quotation respondent's brief from Ex parte Britton, 92 S. W. (2) 224: "To justify a court in punishing for contempt, three things are necessary: (1) Jurisdiction of the subject-matter; (2) JURISDICTION OF THE PERSON; and (3) the authority of the court to render the particular judgment." (Emphasis added.)

How can it be said that Judge Browning had jurisdiction of the parties when he entered the judgment nisi in the present case when they were not in court, actually or constructively? When they did appear in answer to the notice they were only called upon to meet the issues which were raised by the notice; that is, to show cause why the judgment nisi should not be made permanent. In as much as the judgment nisi was void it could not be the basis for a final judgment in the case. As authority for this expression we refer to Ex parte Pease, 57 S. W. (2) at page 576, an opinion by Judge Lattimore, from which we quote the following:

> "We also observe that the order and judgment of the trial court entered on May 10 finding and adjudging applicant guilty of contempt for said publications, SAME BEING AT MOST BUT CONSTRUCTIVE CONTEMPT, and applicant not being present, and no notice ever having been served upon him to appear, would be ENTIRELY VOID and without authority as such judgment; also that, IF THE JUDGMENT THEN SO ENTERED WAS MADE THE BASIS FOR THE JUDGMENT LATER ENTERED on May 16th, in which reference is made to said judgment of May 10th, SAME WOULD ALSO BE WITHOUT AUTHORITY OF LAW." (Emphasis added.)

Apparently when the final order was entered respondent discovered the error in the procedure and attempted to avoid the difficulty by not specifically referring to the judgment nisi. The fact remains, however, that the judgment nisi was used as a basis for the order made after hearing; they contain the same subject-matter in the same language. The court could enter no order under the notice. Brashear v. State, 112 So. 535.

[fol. 603] Our courts, state and federal, with practical unanimity, have long accepted the definition of "due process of law" as formulated by Daniel Webster in his argument in the famous Dartmouth College case, quoted in the following language: "A law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." We know of no criticism of this comprehensive definition. It has been applied, followed, and has determined the result of thousands of cases with a loyalty unknown to any other recorded argument of an attorney at the bar. Every clause in Webster's definition is violated by the court in the instant case when Browning entered judgment nisi. The parties were not present; they had not been heard; no inquiry was made of them; yet, they were condemned. The final order of the court does nothing more than attempt to make this judgment nisi final. The error in entering that judgment was fundamental, because the court was without jurisdiction to enter it. Thomas v. D. C., 90 F. (2) 424; Barnes Drilling Co. v. Phillips, 26 P. (2) 766; see also Simpson v. Stanton, 193 S. E. 64, from which we quote: "Judgment without such citation and opportunity wants of all the attributes of a judicial determination; it is a judicial usurpation and oppression, and can never be upheld where justice is fairly administered."

Furthermore, I am unable to agree with my associates that the evidence introduced in this case would support a judgment for contempt under proper procedure. In determining this question I agree that consideration must be given to all of the publications about which complaint is made, but this cannot be done and understood without also considering the subject-matter of the publications and this has not been taken into account by the majority. If we accept the statement which is made as a basis for the conclusion reached, that "the rule controlling in Texas has long been that 'the publication of matter having reference to a pending suit, which is defamatory and calculated in its [fol. 604] nature to obstruct and impede the administration of justice and to embarrass the judge in the trial of the pending action, constitutes contempt of court,'" we are necessarily relegated to the procedure which took place in the county court in order to conclude the question as to whether or not the publications were intended to "obstruct and impede the administration of justice." If the judge

had entered the wrong judgment and their efforts should be to induce him, not by fear but by reason of further consideration, to set aside a wrong judgment and enter one according to law and justice, could it then be said that they were intending to "obstruct and impede the administration of justice?" The opinion reaches that conclusion without any consideration of the correctness of the judgment in the ouster proceeding. I wish to consider the case in connection with that judgment. For that reason I find it necessary to give brief attention to the civil suit.

This suit, by Jackson, et al. vs. Mayes et al., resulted in judgment for plaintiffs in the justice court. After appeal the case came on for trial in the county court. The evidence and procedure there consumed the greater part of three days, though there was but one issue which forms the basis for the judgment and that was determined by a lease contract, in writing, together with undisputed evidence to the effect that after the expiration of the contract, on March 15, 1945, Mayes had an option to extend it for a year. The rent for the additional period was $275.00 a month instead of $250.00. The lease contained no specific provision for the exercise of this option, either as to the date or manner of giving notice of the lessee's intention to extend it. He simply had the option.

It is very clear that the evidence in the detainer suit will not support a forfeiture. The question is not controlled by statute in our State but it is well recognized that equity does not favor forfeitures and this is especially true of landlord and tenant contracts. The landlord writes the contract. If [fol. 605] he imposes conditions for the exercise of the option, such will be enforced. If, however, none are written in the contract, the courts may not interplace them.

Prior to the expiration date Mayes had gone into the Armed Service and left his business affairs with an agent, who was not advised of the provision for the increased rent. At the proper time he tendered a check in the usual way, for $250.00. Later he gave a new check for the $275.00 but through error it was post dated April 15th instead of March 15th. On the 13th day of April this check was returned to him by the plaintiff's attorney. The failure to pay the rent in the sum of $275.00 by the 15th day of March was the basis for the claim to cancel the lease, and also for the instructed verdict in plaintiff's favor. Such instruction to

the jury, in the manner set out in the original opinion, was contrary to law. There is no defense attempted to be made for this action in respondent's brief. All reference to it has been studiously avoided. It is not considered in this court's opinion. I am unable to see how we can reach the conclusion that relators were attempting to "influence the court in the pending case CONTRARY TO LAW AND JUSTICE," in view of that judgment which is contrary to well recognized rules of equity.

Another phase of the record which has not been considered is that the publications spoke the truth. General allegations are made that they became false by over-emphasis, placed in conspicuous positions in the newspapers, and unnecessarily repeated for the purpose of creating the wrong impression, but the record does not contain any evidence that would in the remotest degree deny the truthfulness of the news reports coming from the trial of the case. While it is pointed out that certain facts were not published, these facts had no bearing on the case on trial and the failure to publish them could not be construed as placing the proceedings in a wrong light before the public. The fact that there were other parties interested, whose names were not mentioned, and that they were prominent [fol. 606] people, will not constitute contempt however unfair it may appear to the court, or to others' names.

It is well recognized that the truth or falsity of publications may always be properly considered in fixing punishment. In many cases the truth or falsity is relied upon in determining intent—the very essence of crime. Intent is involved in the case now before us. I am of the opinion that the truth of the publications is the determining factor because there appears no defamatory, degrading or debasing language. There was no effort to obstruct, interrupt, prevent, or embarrass the administration of justice. At most it was a plea for a trial by one qualified to conduct the case according to the rules of justice. There was no reflection on the judge's integrity. All references to any irregularities are explained by the fact that he is not a lawyer.

We do not wish to be committed to the doctrine that proof of the truth of statements is always a complete defense to a charge of contempt in a case of this character. At the same time, we must recognize the general rule which has

been stated by this court, to which we refer as follows, in *Ex parte Green*, 81 S.W. 723, at p. 725:

> "There can be no constructive contempts of court with reference to publications reflecting on the court or the judge thereof, unless the publication is not only of a defamatory character, but is untrue, and, in addition thereto, relates to some particular case then pending, and is calculated to embarrass the court in the trial or disposition thereof. As to other publications not relating to a pending case, no matter how defamatory the language used may be with reference to the court or the judge thereof, this will not constitute a contempt, because it cannot be regarded as calculated to interfere with the administration of justice."

Again from Ex parte Pease, supra:

> "It is still the rule in this State that one charged with contempt shall be allowed to prove the truth of his alleged contemptuous utterance. Ex parte O'Fiel, 93 Tex. Cr. R. 216, 246 S. W. 664. We think proof of the truth of the matters so published would have entitled applicant to his discharge upon the hearing before the court. We note the court refused to permit him to make such proof to which he took his proper bill of exception."

[fol. 607] We find numerous decisions to the same effect from various jurisdictions. The truthfulness of the publications is certainly entitled to some consideration in any character of case.

The public has an interest in the proper and effective procedure of our courts. Every case, civil as well as criminal, carries with it a public interest. If the public has an interest it is entitled to know what is taking place. In the early part of the trial evidence was introduced, making sensational charges against the opposing party. Such charges related to liquor violations, gambling, etc., and had no part in determining the rights of the parties in the civil case. The court overruled objections to this testimony and extended the time of the trial of the case (at the expense of the tax payers, always) to delve into these mat-

ters. It is natural to expect that such evidence would attract crowds to the court room and generate discussions on the streets. People would look to the newspapers for the true facts as to what occurred. Without such publications gossip will usually run wild. The names of good men might become involved. "Winds of doctrine should freely blow for the promotion of good and the correction of evil." The public was entitled to receive the true facts. If this weighed on the head of the judge he brought his own house down. It cannot be laid to relators.

Finally, when the instructed verdict was given and the unusual procedure followed, wherein the jury refused to render the verdict as instructed, the public still had an interest. All of the machinery of the court, the building in which the trial was conducted, and the time consumed by the jurors, remain matters of public interest as being tax supported. The public may properly expect that all cases tried shall be conducted in an orderly manner, according to law, and that a just and legal judgment be finally entered. That is the purpose in providing courts at public expense to conduct private litigation.

Relators are members of society and in their capacity as [fol. 608] gatherers, commentators and publishers of the news, they have a responsibility to the general public. They exercised it in a fair and reasonable way, considering the subject-matter with which they had to deal and the public interest involved. Thus we find every element of contempt known to modern jurisprudence to be lacking in the record and resort is had to the old idea which invests royalty with imaginary perfection and forbids a discussion of any question concerning the judge's acts. He was the representative of the king and, as such, could do no wrong. It is important that the dignity of the court be maintained, but it is likewise important that the public interest be served. If that requires a discussion of the procedure in court, the public interest should be held superior. It is not so much a naked "freedom of the press" for which we are concerned as it is the public interest in the efficiency of our government.

The view we herein express has been ably treated in the case of Sullens v. State, 4 So. (2) 356, by the Supreme Court of Mississippi. We quote from it as follows: "The exercise of this right may embarrass the particular func-

tionary; it may depreciate the effectiveness of our legal procedure, yet so long as it pulls up short of the obstruction or impedance of the machinery of the court then in motion, it is free from interference by the courts." The paragraph from which the foregoing is taken concludes: "One may criticize the court as inefficient so long as he does not contribute to its inefficiency."

The concluding paragraph of the opinion, in the Sullens case, says:

> "We are not unmindful of the extent to which the full exercise of the freedom of the press may on occasion tend to embarrass a trial judge in the discharge of one of the most difficult, exacting and important public duties. * * * The two writings here involved must be adjudged in the light both of their text and their context. When viewed in both aspects we do not discover in them the ingredients of constructive contempt."

Chief Justice Smith, of the Mississippi Supreme Court, wrote a concurring opinion from which we quote at length [fol. 609] because of the pointedness of expression, as well as the unavailability of the report to the bench and bar of Texas.

> "Since the adoption of our constitutional guaranties of freedom of speech and of the press, American newspapers in response to public demand therefor have assumed the duty of giving the people full information of the conduct of public officials, including the judges of all courts. Such information is necessary in a Democracy in order to insure the observance of its processes. 'Star Chamber proceedings or secrecy in the administration of justice is provocative of injustice and tyranny. The people have a right to know how its judicial, as well as executive officers, perform their duty, and publicity of the acts and doings of court officials serves as a material factor in keeping the stream of justice unpolluted.' Patterson's 'Free Speech and a Free Press,' p. 151. The discharge of this duty was here particularly incumbent upon the appellant, because of the threat made by the judge to jurors who had voted for an acquittal in a criminal case to cite them for contempt of court."

The Sullens case was decided in 1941. The first of the publications under discussion took place while the court was still in session and related to the conduct of the court in handling the grand jury and the trial of cases generally. Many of the indictments returned were pending when the other publications were made and it cannot be said that the publications related to matters that had already been closed. The facts of the case, particularly the editorials, are very similar in all material respects to the case before us.

I discover, too, an over emphasis, if not a fanciful distinction, made between a case now pending and one which has been concluded. This appears, however, to be in keeping with many decisions, in my view the dignity of the court may be as much injured by a subsequent discussion of its action as if made during the court procedure. Such holdings constitute a recognition of our departure from the common law decisions as they came to us in the early day. If the public is entitled to know only after the case is concluded, particularly one from which there is no appeal as in the instant case, we are then like the man who locked the stable after the stock had been stolen from it. After the majority opinion in this case, it will be exceedingly [fol. 610] dangerous for a newspaper to publish the court proceedings and, it appears to me, for the citizenry to discuss same until the whole matter is concluded. The public would thereby be precluded from informing themselves as to the capacity of the various officers to occupy the positions to which they have been elected. We would not have the best information obtainable in the re-election of our judges, clerks and bailiffs.

I have searched in vain to find a case, in this or any other jurisdiction, where a party has been held in contempt of court for publishing the truth; for attempting to induce the court to decide a case according to law; or for a judgment nisi which has been held valid in a case of constructive contempt. I have examined all of the cases cited by all parties, and most of those upon which such cases rely as well as many others. There is no parallel to this case to be found.

Finally, the opinion is in error in the conclusion that the finding of Craig guilty of contempt necessarily includes both of the others. Mulvaney was a news reporter and had no part or responsibility in the editorials or the manner

of the publications after his story of each daily occurrence was reported to his superiors. If his part in the transaction should be contemptuous Craig would be responsible, as the publisher, but Mulvaney is not responsible for the things that McCracken and Craig did.

I acknowledge the high quality of the briefs by both sides of this controversy. They have been of unusual assistance in the very difficult questions treated.

I can not believe that this opinion can stand as the law of this State, and respectfully record my dissent.

Beauchamp, Judge.

(Delivered February 13, 1946.)

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[fol. 611] In Court of Criminal Appeals of Texas

Ex parte No. 23232-3-4 Conway C. Craig, Bob McCracken and Tom Mulvaney

From Nueces County. #23233, Ex parte Bob McCracken and #23234, Ex parte Tom Mulvaney, Consolidated with #23232, Ex parte Conway C. Craig

Relief Prayed for Denied and Relators Remanded.
Opinion Judge Davidson. Judge Beauchamp dissents.

Judgment—February 13, 1946

This cause came on to be heard on the original application for writ of habeas corpus, and the same being considered; it is ordered, adjudged and decreed by the Court that said writ of habeas corpus be denied and that the Relators, Conway C. Craig, Bob McCracken and Tom Mulvaney, each be and are hereby remanded to the custody of John B. Harney, Sheriff of Nueces County, Texas, and that this decision be certified to the Sheriff of Nueces County, Texas, for his observance.

[fol. 612] IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE CONWAY C. CRAIG, No. 23,232

EX PARTE BOB MCCRACKEN, No. 23,233

EX PARTE TOM MULVANY, No. 23,234

Habeas Corpus from Nueces County

RELATORS' MOTION FOR REHEARING

To said Honorable Court :

Come now Conway C. Craig, Bob McCracken and Tom Mulvany, Relators, and respectfully move that the judgment and opinion of the Court entered and delivered in the above consolidated cause on February 13, 1946, be set aside and withdrawn or corrected, and that they be granted a rehearing, and upon consideration thereof they be granted the relief originally prayed for in their respective petitions herein. As grounds for this motion Relators respectfully show:

1

This Honorable Court erred in holding that the truth of the publications for which they were convicted was no offense to the charge of contempt.

The truth of the publications was made an issue first by the complaint and again by the judgment of contempt, each of them being founded upon the charge of falsification as the basis of the alleged contempt—"by means of which" it is charged in the complaint, and found in the judgment, that the alleged wrong was accomplished.

2

This Honorable Court erred in holding that the charge [fol. 613] of contempt was sustained, and in refusing to discharge the relators, notwithstanding the fact that the prosecution failed to sustain the charges of misrepresentation, or falsification, upon which the charge of contempt is founded, and upon which the judgment of contempt is predicated.

The complaint, reasonably and fairly construed, charges that the alleged contempt, that is, the intent to influence the court in its action on the motion for new trial in the Jackson-

Mayes suit, was accomplished "by means of" a false presentation (through the affirmative false statements, omissions, distortions and over-emphasis) of the proceedings in the detainer suit. The judgment of contempt (see paragraph 2, R. Vol. 2, p. 433) is predicated upon substantially the same ground. The prosecution thus having tendered the issue, and the court having predicated the judgment of contempt upon a resolution of that issue, the relators were and are entitled to meet the issue and to show as they have shown that the charge was not sustained.

3

This Honorable Court erred in holding that relators were not entitled to show as a defense that Judge Browning's decision (in the detainer suit) was wrong. And the Court erred in further holding in that connection that "if we were to allow that defense here, we would review that ruling in direct opposition to the statute." (Opinion, p. 13.) As we undertook to show in our main brief, we were entitled to challenge the correctness of Judge Browning's decision in the detainer suit in view of the charges of contempt; and we are entitled to challenge it in this Court for that reason and in view of the judgment of contempt. The charge against relators that they falsified the nature of the detainer trial and *thereby* undertook to influence the court is predicated upon Judge Browning's erroneous conception of the principles of law by which the Jackson-Mayes case *were* controlled and should have been decided. In view of the way in which the charge of contempt was preferred, and in [fol. 614] view of the judgment of contempt (especially paragraph 2), we were entitled to meet the charge by showing that we did not falsify the record. In that connection we were entitled to show that Judge Browning misconceived the controlling issues of fact because he misapprehended the controlling principles of law. In view of this charge against relators, and in view of the judgment of contempt against them on that ground, it did not lie within the power of Judge Browning by erroneously deciding the Jackson-Mayes case to compel us to defend the contempt charge by accepting as correct Judge Browning's decision of the Jackson-Mayes case. And in the circumstances this Court is endowed with power and jurisdiction to decide for the purposes of this case any question of law which properly arises in defense of the relator's rights. This Court cannot

be bound to accept for the purposes of the criminal proceedings an erroneous decision in a civil proceeding between other litigants.

4

This Honorable Court erred in overruling the relators' defense predicated upon freedom of the press guaranteed to them by the due process clause of the Fourteenth Amendment of the United States Constitution; and this Court erred in failing and refusing to discharge the relators upon the defense so asserted.

5

This Honorable Court erred in holding "that the publications were not only reasonably calculated to accomplish that purpose (to compel the judge to change his ruling) but there was also a 'clear and present danger' that they would and the likelihood that such result would follow was 'extremely serious' and the degree of 'imminence extremely high.'"

6

This Court predicated its decision of the National constitutional question upon the assumption of the existence of an irreconcilable conflict between the liberty of the press guaranteed by the Constitution and the "due administra-[fol. 615] tion of justice in the courts." On that assumption the Court said that "we have no difficulty in arriving at the conclusion that, as between the two, liberty of the press is and must be subservient and inferior to that of due administration of justice in the courts." This is an erroneous conclusion and has induced the Court in the present case to reach an erroneous decision of the constitutional question. Freedom of the press is one of the fundamental freedoms, and is not subservient or inferior to anything. It is of course true that the due administration of justice, viewed from the standpoint of the rights of the litigant as well as from the standpoint of the duty and responsibility of the courts, must be protected and preserved. But there is no conflict between the freedom of the press guaranteed by the Constitution and the obligations of the courts to administer justice. It is the theory of our Constitution that the courts shall administer justice and that their integrity and their independence and their ability to function effectively as courts of justice shall thrive under the Constitu-

tion, including its fundamental guaranties. Freedom of the press as guaranteed by the Constitution does not include the privilege of undermining the courts and of making it impossible for them to function as tribunals of justice. But this does not mean that there is hostility between the guaranteed freedom and the function of the courts. And in determining the question in the present case whether the freedom guaranteed by the Constitution has been overstepped by the relators an erroneous conclusion necessarily follows if the problem is approached by deciding in advance that the guaranteed freedom is subservient or inferior to the administration of justice. The Constitution, on the other hand, contemplates that the two shall be carried on together and that the courts shall function—shall be able to function, under the freedom guaranteed by the Constitution, and not under a condition that requires the suppression of the constitutional freedom.

[fol. 616]

7

This Honorable Court erred in holding that the relators were guilty of contempt as charged, and are not entitled to be discharged under the freedom of the press guaranteed by the Texas Constitution. In this connection the Court erred in holding that the charge of contempt was sustained on the ground that there was a reasonable tendency to coerce or influence the court in a manner that amounted to an obstruction of the administration of justice.

8

This Honorable Court erred in holding that the relators are not entitled to be discharged under the freedom of the press guaranteed by the Texas Constitution, and in that connection in failing to hold that the charge of contempt was not sustained. The charge is predicated upon the accomplishment of the alleged wrong by means of falsification, the alleged purpose of which was to influence the court to decide the Jackson-Mayes case contrary to the evidence and the law. The charge was not sustained.

9

It is apparent from the record that the relators have been convicted of contempt because of acts that, as conceived by the county judge, amounted to a scandalizing of

the court; that is, publications which, as viewed by the court, reflected upon his integrity. That the punishment was inflicted upon that ground is made plain by the express statements in the judgment of contempt as it was made plain by the action of the county judge in inviting the relators to purge themselves at the conclusion of the contempt hearing—long after the judgment in the Jackson-Mayes case had become irretrievably final. This illegal action of the court vitiates the entire judgment. In view of the freedom of the press guaranteed by the National Constitution, already invoked, a conviction for alleged constructive contempt on the ground of so-called scandalizing of the court is void. Besides, it was made plain beyond any room for doubt that the articles in the press did not [fol. 617] reflect upon the integrity of the court.

10

This Honorable Court erred in holding that the articles in the press, and particularly the editorial comments, charged in the complaint were intended and calculated to induce the court to change his decision on the merits of the Jackson-Mayes controversy. This Court has said in its opinion that there is no escape from the conclusion that it was the purpose and intent of the relators to force Judge Browning to grant Mayes a new trial, and that "the only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case." According to their viewpoint, Judge Browning was wrong and they took it upon themselves to make him change his decision." (Opinion, p. 18.) This is incorrect. Relator McCracken stated in his editorial comment that it was not his province to say, and that he did not profess either to know or to say, whether the decision was legally right or wrong. Relators were careful to abstain from attempting to usurp the function of the court in this respect.

Jackson had no right vested under the laws and Constitution to have his case tried by a judge who had manifested such a bias that the parties could not get an impartial trial at his hands. In contemplation of law, if the motion for new trial had been granted and an impartial judge had been substituted to try the case anew, the parties would have stood where they originally stood, on equal terms

before the law. We respectfully submit that any fair-minded person who reads the entire record of the Jackson-Mayes trial will come to the conclusion that Mayes did not get a fair trial. It is wrong while talking about Jackson's rights under the law to forget about the rights of Mayes. The press did not undertake to coerce Judge Browning to grant a new trial and decide the case the other way. The press did not undertake to decide the merits of the case. All the press did was to say that the parties were entitled to a fair trial. This was a legitimate comment, based upon [fol. 618] the way in which the trial was conducted. The comment was not predicated at all upon the fact, that the *decision* was against Mayes and in favor of Jackson.

11

This Honorable Court erred in holding (Opinion, p. 1) that "It is made to affirmatively appear that if the contempt judgment is valid as to any one of the relators, it is valid as to all; and if invalid as to either, it is such as to all." We agree that the latter statement is correct, but if so, the first half of the statement is necessarily incorrect. The two parts of the statement contradict each other. We do not object to the act of the Court in consolidating the three cases and disposing of them together. We think that this was entirely proper, and that there is no occasion to do otherwise.

12

This Honorable Court erred in failing and refusing to discharge the relators on each and all of the grounds set forth in relators' main brief filed in support of their petitions for writ of habeas corpus.

13

This Honorable Court erred in overruling relators' defense under the Fourteenth Amendment of the National Constitution and in holding that such ruling is authorized by an application to the facts of this case of the decision of the United States Supreme Court in the cases of Times-Mirror Company v. California and Bridges v. California, 314 U. S. 252 (commonly referred to as the Bridges case). This Court has reached such conclusion by misinterpreting the Bridges case. This Court has attempted to construe

the Bridges case in conjunction with earlier decisions that have been overruled and are not in harmony with the Bridges decision.

14

The judgment of contempt here complained of is void even under the test laid down in the minority opinion of [fol. 619] the United States Supreme Court, in the Bridges case. For stronger reason the judgment is void under the test announced by the majority.

With leave of Court we will file shortly and within such time as may be limited by the Court a printed supporting argument. Meanwhile, a copy of this motion is being furnished to opposing counsel.

We respectfully prays that this motion be duly set for submission, and that upon its due consideration it be granted and that the relators be granted the relief originally prayed for, and for general relief.

Respectfully submitted, Kleberg, Eckhardt, Mobley & Roberts, Marcellus G. Eckhardt, P. O. Box 909, Corpus Christi, Texas, Black, Graves & Stayton, By (Signed) Ireland Graves, P. O. Box 1073, Austin, Texas, Attorneys for Relators, Conway C. Craig, Bob McCracken and Tom Mulvaney.

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[fol. 620] In Court of Criminal Appeals of Texas

No. 23232.

Ex parte Conway C. Craig, Bob McCracken, Tom Mulvaney

Appeal from Nueces County

Opinion on Motion for Rehearing—April 3, 1946

Relators have filed a motion for rehearing, and supporting printed argument as well as a strong oral argument.

Because of some difference of opinion among ourselves, and the importance of the question involved the case had our most patient and careful consideration on original submission. The motion for rehearing has caused us to re-examine the voluminous record. Our conclusions expressed in the majority opinion remain steadfast. Any effort to write further on the motion would result only in expressing

the same views in different language with no benefit accruing to anyone.

We appreciate the work of the attorneys on both sides of the question as reflected by their briefs.

The motion for rehearing is overruled.

Hawkins, Presiding Judge.

(Delivered April 3, 1946.)

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[fol. 621] IN COURT OF CRIMINAL APPEALS OF TEXAS

Ex parte No. 23232 CONWAY C. CRAIG, BOB MCCRACKEN and TOM MULVANEY

From Nueces County. Rehearing Overruled. Opinion Pres. Judge Hawkins

JUDGMENT ON MOTION FOR REHEARING—April 3, 1946

This cause came on to be heard on the Relators' motion for rehearing and the same being considered, it is ordered, adjudged and decreed by the Court that said motion be and the same is hereby in all things overruled.

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[fol. 622] IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE CONWAY C. CRAIG, No. 23,232

EX PARTE BOB MCCRACKEN, No. 23,233

EX PARTE TOM MULVANY, No. 23,234

Habeas Corpus from Nueces County

RELATORS' MOTION FOR A STAY

To said Honorable Court:

Come now Conway C. Craig, Bob McCracken and Tom Mulvany, relators, and respectfully move this Honorable Court to enter an order staying the issuance of the mandate and staying any and all proceedings upon the judgment against relators for a period of 90 days from this date in order that relators may apply to the Supreme Court of the

United States for a writ of certiorari. Relators further move the Court that, upon proof by relators that they have filed their petition for certiorari in the Supreme Court of the United States, this Court enter an order staying the issuance of the mandate and staying any and all proceedings on the judgment against relators until final action of the Supreme Court of the United States.

As grounds for this motion relators show the Court that they intend to apply to the Supreme Court of the United States for a writ of certiorari and that they intend to proceed with due diligence to prepare and file their petition for certiorari and to prepare and file the record in this case in the Supreme Court of the United States.

Relators respectfuly pray that this motion be in all things granted.

[fol. 623] Respectfully submitted, Kleberg, Eckhardt, Mobley & Roberts, Marcellus G. Eckhardt, P. O. Box 909, Corpus Christi, Texas; Black, Graves & Stayton, (Signed) John W. Stayton, P. O. Box 1073, Austin, Texas, Attorneys for Relators, Conway C. Craig, Bob McCracken and Tom Mulvany.

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ORDER GRANTING STAY

The foregoing request of Conway C. Craig, Bob McCracken and Tom Mulvany, for stay of issuance of mandate is granted, and the Clerk of the Court of Criminal Appeals is directed to stay the issuance of mandate and all other proceedings upon the judgment against relators for a period of ninety days from this date in order that they may apply to the Supreme Court of the United States for writ of certiorari. And the Clerk is further directed that in the event the writ is granted by the Supreme Court of the United States that the issuance of mandate be delayed until final action by the Supreme Court of the United States upon the matter.

This 3d day of April, A. D. 1946.

(Signed) F. L. Hawkins, Presiding Judge.

[fol. 624] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 625] IN THE COURT OF CRIMINAL APPEALS OF TEXAS

In the Matter of CONWAY C. CRAIG, BOB McCRACKEN and TOM MULVANY

STIPULATION AS TO PRINTING RECORD

Pursuant to United States Supreme Court Rule 38, Paragraph 8, counsel hereby stipulate that the Clerk of the Supreme Court of the United States may omit from the printed record the following matter, which is deemed not essential to a consideration of the questions presented by the petition for the writ of certiorari:

| | Original Record Page |
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| 1. Clerk's endorsement and certificate | 8 |
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| 3. Exhibits "A" and "B" and clerk's endorsement and certificate | 14 thru 22 |
| 4. Exhibits "A" and "B" and clerk's endorsement and certificate | 25 thru 33 |
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| 7. Order Appointing Special Assistant County Attorney *ad litem* | 57 |
| [fol. 626] | |
| 8. Application for enlargement of time in which to Answer and for Continuance | 58 |
| 9. Order extending time for Answer and Continuance of Cause to July Term | 62 |
| 10. Writ of *Scire Facias* and sheriff's return and clerk's endorsement | 63 thru 82 |
| 11. Clerk's endorsements | Bottom p. 147 thru top p. 148 |
| 12. From "Be It Remembered" on p. 149 through line 3 on p. | 151 |
| 13. Agreement of Counsel re: Subpoena | 291 thru 295 |
| 14. State's Exhibit No. 15 (Subpoena and Return and clerk's endorsement) | 296 thru 298 |
| 15. Omit all of | 325 and 326 |
| 16. Court Reporter's Certificate, Agreement of Counsel, and Order of County Judge approving Transcript | 329 thru 331 |
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It is further agreed that this stipulation may be transmitted with the record by counsel for petitioners to the Clerk of the Supreme Court of the United States for the purpose of complying with Rule 38, Paragraph 8.

This 9th day of May, 1946.

Marcellus G. Eckhardt, Ireland Graves, Counsel for Petitioners. Grover Sellers, Attorney General of Texas; Carlos Ashley, First Assistant Attorney General; Ernest S. Goens, State's Attorney, Counsel for Respondent, The State of Texas.

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[fol. 627] Supreme Court of the United States, October Term, 1946

No. 241

Order Allowing Certiorari—Filed October 14, 1946

The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 14, 1946.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 241

CONWAY C. CRAIG, BOB MCCRACKEN and TOM MULVANY,

*Petitioners,*

vs.

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

MARCELLUS G. ECKHARDT,
CHARLES L. BLACK,
IRELAND GRAVES,
*Counsel for Petitioners.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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# No.

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CONWAY C. CRAIG, BOB MCCRACKEN, and TOM MULVANY,

*Petitioners,*

VS.

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

---

**PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.**

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*To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Conway C. Craig, Bob McCracken and Tom Mulvany respectfully petition for a writ of certiorari to the Court of Criminal Appeals of Texas to review its decision and judgment rendered on February 13, 1946 (R. 418; 449), in Ex parte Craig, et al., 193 S. W. (2d) 178, not yet officially reported.

## A.

### Summary Statement of the Matter Involved

Petitioners, the publisher, managing editor and a news reporter, respectively, of daily newspapers of general circulation in the City of Corpus Christi and in Nueces County, Texas, were accused in the county court of that county of contempt of court for publishing, in May-June, 1945, news accounts of, and an editorial commenting upon, the trial of a civil case in that court. The news accounts and editorial complained of were published when the civil case was pending, in the sense that the motion for new trial had not then been denied.

Petitioners were accused of attempting to "scandalize the court" and to influence the judge in acting upon the motion for new trial (R. 18), after he had instructed the jury to return a verdict for the plaintiff (R. 207). On June 4, 1945, while such motion was pending, the same county judge, acting upon a complaint filed on that day by a purported "officer of the court" entered a judgment *nisi*, adjudging petitioners guilty of contempt, and directing that they be summoned to appear on June 8, 1945, and show cause why the judgment *nisi* should not be made final (R. 26). By such judgment *nisi* petitioners were sentenced to serve the maximum prison term of 3 days in jail "unless they purge themselves thereof" (R. 26).

The motion for new trial in the civil case, a forcible detainer suit, was denied and judgment became final on June 6, 1945 (R. 209). At a subsequent term of

court, on August 3, 1945, the county judge, after hearing, entered the final judgment of contempt, based upon these findings: "the said reports and editorial,* considered in their entirety, by reason of inaccuracies contained therein, material matters omitted therefrom, emphasis on matters of evidence adduced at the trial of Cause No. 3624, and the inclusion in said articles and editorial of matters foreign to the record in said cause, were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in cause No. *5095*, to coerce and compel a judgment contrary to the law and the evidence in said cause No. *5095* and to block the administration of justice, and that the said news reports and editorial were intended so to do" (R. 81). (No. 5095 is the justice of the peace court number, No. 3624 the county court number.) Additional findings specified the way in which the three petitioners, respectively, were said to be implicated in the offense thus described (R. 82-83).

Making use of the only means afforded by Texas law of having the contempt judgment reviewed, petitioners, on the day of that judgment and while they were in custody of respondent sheriff (R. 226), applied to the Court of Criminal Appeals of Texas for

*The parts of the news reports and the parts of the editorial complained of appear in the opinion of the Court of Criminal Appeals (R. 420-424). Such news reports in full are at R. 359-360; 362-374; 380-383; 384-385. Since we do not agree with the Court of Criminal Appeals' interpretation of the editorial (a column entitled. The Crow's Nest, R. 378-380), we reproduce it in full as Appendix "A", post, p. 35.

writs of habeas corpus. The Court not being in session, temporary writs were granted by the Presiding Judge returnable to the full court (R. 10-11) which later, after hearing argument, adjudged that petitioners were guilty of contempt (R. 449). The majority of the Court held that petitioners were not protected by the freedom of the press guaranteed by the State and National Constitutions (R. 418-438). Judge Beauchamp, dissenting, without expressly mentioning the National Constitution, held that the publications were not contemptuous (440-449).

The Presiding Judge of the Court of Criminal Appeals granted a stay of execution pending disposition by this Court of this proceeding (R. 458).

## B.

## Jurisdictional Statement

1. The jurisdiction of the Court is invoked under Section 237(b) of the Judicial Code, as amended; 28 U. S. C. Section 344(b). The judgment of the Court of Criminal Appeals of Texas to be reviewed was entered on February 13, 1946 (R. 449). Rehearing was denied on April 3, 1946 (R. 457). The jurisdiction of this Court is sustained by the following cases: *Collins v. Texas*, 223 U. S. 288; *Daly v. Elton*, 195 U. S. 242; *Thomas v. Collins*, 323 U. S. 516; *Bridges v. California*, 314 U. S. 252; *Pennekamp v. Florida* (No. 473, October Term, 1945).

2. The Court of Criminal Appeals of Texas is not an intermediate court. It is the court of last resort

in Texas of all matters within its jurisdiction. Its judgments are not reviewable by the Texas Supreme Court or by any other Texas court.*

3. The constitutional question was raised by petitioners at their first opportunity and was pressed throughout. It was raised by Craig in his county court answer (R. 27), which was presented in support of petition for habeas corpus in the Court of Criminal Appeals (R. 1); raised and kept good in the same way by McCracken (R. 43, 8); and by Mulvany (R. 62, 9). That the question was properly presented in the Court of Criminal Appeals affirmatively appears by that Court's opinion: "Relators each applied to this Court for the writ of habeas corpus alleging in the main that the judgment was void and unenforcible because it was in contravention of the due process and freedom of the press provisions of our State and Federal Constitutions. It was

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*In view of the limitations upon the jurisdiction of the Supreme Court of Texas to issue the writ of habeas corpus the conviction could not be reviewed by that court; Ex parte Murray Jackson, 113 Texas 58. The Texas Supreme Court had jurisdiction of habeas corpus in Thomas v. Collins, 323 U. S. 516, since Thomas had been held guilty of contempt for violating an order of the district court in a civil case. Not so here. This case is within the jurisdiction expressly conferred by the Texas Constitution on the Court of Criminal Appeals. Art. 5, Sec. 5. "As applied to the law of contempt, the term 'jurisdiction' has a peculiar significance." Ex parte Miller, 91 Tex. Cr. Rep. 607, 609; 240 S. W. 944, 945. "On habeas corpus, therefore, it must appear not only that the tribunal which rendered the judgment was vested with power to enter a judgment of contempt, but also that it had jurisdiction, upon the facts before it, to render the particular judgment upon which the relator is held." Ibid. 91 Tex. Cr. Rep. at 610; 240 S. W. 946.

by reason of the particular conditions thus existing that we granted the writs" (R. 419). Further, said the Court: "It is contended by relators that the Fourteenth Amendment to the Federal Constitution applies to the States the same standard relative to freedom of press and speech as under the First Amendment are applicable to the Federal government, * * *" (R. 432).

4. The questions presented are substantial: *(a)* Petitioners have been adjudged guilty of contempt for the publication in daily newspapers of news reports and an editorial comment concerning a forcible detainer suit in the county court of Nueces County, Texas, while a motion for new trial was depending, upon law questions. Notwithstanding the fact that it plainly appears that the newspaper publications did not present a clear and present danger of subverting the mind of a judge of reasonable fortitude, the Texas Court of Criminal Appeals has adjudged that petitioners were guilty of contempt of court. While professing to apply the rule enunciated in the *Bridges* case, the Court has really applied the rule announced in the majority opinion in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, and in *Craig v. Hecht*, 263 U. S. 255. After quoting from *Craig v. Hecht* (R. 589-590), the Court adopted and almost literally copied the conclusions of Judge Killits as summarized by Chief Justice White in the *Toledo Newspaper* case, 247 U. S., at 414-415 (R. 437). This is in conflict with the *Bridges* and *Pennekamp* cases and with the dissenting opinion of Justice Holmes in the *Toledo Newspaper case*, ex-

pressly approved by this Court in the *Bridges* case, 314 U. S., at 273; 278. *(b)* Petitioners were convicted of contempt for an alleged scandalizing of the county judge. This is condemned by the entire Court in the *Bridges* case. The county judge having no lawful power to impose summary punishment on such ground, his action in so doing would vitiate the judgment, even if it were not otherwise condemned by the decisions of this Court in the *Bridges* and *Pennekamp* cases. *Thomas v. Collins*, 323 U. S. 516, 529.

## C.

## The Questions Presented

Whether petitioners have been deprived of their right of freedom of the press guaranteed by the Fourteenth and First Amendments to the United States Constitution:

*First*, by applying, under the guise of the "clear and present danger" test, the "tendency" rule of *Toledo Newspaper Co. v. United States*, 247 U. S. 402.

*Second*, by not sustaining the defense that there was no immediate and clear danger of coercing a judge of reasonable fortitude.

*Third*, by rejecting as a defense the truth of the news reports, where, as here, petitioners were accused of committing contempt "by means of" false reports of the trial.

*Fourth*, whether such constitutional guaranty has been infringed where the conviction for contempt and consequent punishment are predicated in part upon an alleged scandalizing of the accusing judge, absent a charge, a finding, and proof that the alleged scandalizing was an effective means of intimidation.

## D.

### Reasons Relied on for Allowance of the Writ.

1. *The decision of the Court of Criminal Appeals of Texas in this case is not in accord with the decisions of this Court in Bridges v. California, 314 U. S. 252, (1941), and Pennekamp v. Florida, No. 473, October Term, 1945; decided June 3, 1946.*

(a) The court below, paying formal deference to the *Bridges* decision, announced that the publications complained of presented a clear and present danger of compelling the trial judge to change his ruling on motion for new trial. After quoting with approval from *Patterson v. Colorado*, 205 U. S. 463; and from *Craig v. Hecht*, 263 U. S. 255, the court below adopted (R. 437) as grounds for its conclusion the basic findings of Judge Killits, as condensed by Chief Justice White, in *Toledo Newspaper Co. v. United States*, 247 U. S. 402. In his dissenting opinion in that case Justice Holmes held that this was inadequate support for a judgment of construc-

tive contempt. The dissenting opinion in that case was approved and the majority view was rejected by this Court in the *Bridges* case, 314 U. S. at 273; 278. The Texas Court of Criminal Appeals in this case, while acknowledging the binding force of the *Bridges* rule, has applied the "tendency" test, in conflict with it.

(b) The decision in this case is in further conflict with the *Bridges* and *Pennekamp* decisions in that the court below has taken no account of the standard applicable to the accusing judge. The court below did not find, nor would the facts support a finding, that the publications presented a clear and present danger of overthrowing the mind or the will of a judge of reasonable fortitude. No judge worthy of the name could have been coerced by the publications of which complaint is made in this case.

(c) The charge of contempt was predicated in part upon an alleged scandalizing of the court; and upon that ground, at least in part, the judgment of guilt was founded and the punishment assessed. In the judgment *nisi* the county judge found that "the purpose of this representation * * * was intended and calculated to reflect upon the integrity of the court, and bring it into disrepute and prejudice and influence the court in its ruling on the aforesaid motion for a new trial, and that the said publications and circulations were made for the purpose and with

the intent of scandalizing the court * * *" (R. 26). The county judge finally adjudged that "said reports and editorial, considered in their entirety, by reason of inaccuracies contained therein, material matters omitted therefrom, * * * were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice, * * * and to block the administration of justice," etc. (R. 81). In the *Bridges* case this Court held unanimously that merely scandalizing the court cannot be punished as constructive contempt. This vitiates the entire judgment. *Thomas v. Collins*, 323 U. S. 516, 529.

2. *The decision below was arbitrary and should be reviewed by this Court.*

The petitioners were charged in the complaint (R. 18) and in the judgment *nisi* with having committed contempt "by means of false statements, omissions, distortions and overemphasis;" (R. 26). Upon this ground they were convicted and punishment was assessed (R. 81). The Court of Criminal Appeals held "it is no defense that the publications were true" (R. 431). Judge Beauchamp, dissenting, held that the news reports were essentially true, and that, in the circumstances, this was a complete defense (R. 444).

Wherefore, your petitioners pray that a writ of certiorari be issued under the seal of this Court, directed to the Court of Criminal Appeals of Texas, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said Court of Criminal Appeals be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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# No.

---

CONWAY C. CRAIG, BOB MCCRACKEN, and
TOM MULVANY,
PETITIONERS,

VS.

JOHN B. HARNEY, SHERIFF

---

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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## I.

## Preliminary Statement

The opinions below ~~(R. 418) are~~ unofficially reported, *Ex parte Craig, et al.*, 193 S. W. (2d) 178. Statement of the Matter Involved, Jurisdiction, and the Questions Presented appear in the foregoing petition for writ of certiorari.

## II.

### Summary of Argument

Point 1. The decision of the Court of Criminal Appeals of Texas upholding the conviction of petitioners for contempt of court has deprived the petitioners of their right of freedom of the press guaranteed by the Fourteenth and First Amendments of the National Constitution as construed by this Court in *Bridges v. California (Times-Mirror Co. v. Superior Court)*, 314 U. S. 252 (1941), and in *Pennekamp v. Florida* (No. 473, October Term, 1945, decided June 3, 1946). While acknowledging the binding force of the "clear and present danger" test, the court below has not applied it, but instead has applied the "tendency" test as announced and applied in *Toledo Newspaper Co. v. United States*, 247 U. S. 205.

Point 2. There was no contempt of court since the publications created no clear and present danger of coercing a judge having normal stamina or reasonable fortitude.

Point 3. Petitioners were charged with having contemned the court "by means of" false news reports (R. 18; 26). This was the basis of the judgment of conviction (R. 145). In these circumstances the petitioners presented a complete defense by showing that the news accounts were essentially true.

Point 4. The punishment was imposed, at least in part, for scandalizing the court. This vitiates the entire judgment.

## III.

## ARGUMENT

### Point 1

**Petitioners have been deprived of their right of freedom of the press guaranteed by the United States Constitution in that, under the guise of applying the "clear and present danger" test the court below has applied against them the "tendency" test and has decided the case on the theory of Toledo Newspaper Company v. United States, 247 U. S. 205.**

The Court of Criminal Appeals declared that courts and judges "are open to criticism for their acts as are all other officials. Such is the right guaranteed by our State and Federal Constitutions of freedom of the press and speech. But when newspaper publications are made during the pending of a case in court and reach the point of interfering with the due administration of justice in the courts of this State, they cease to be protected by those constitutional guarantees. Liberty of the press and freedom of expression must not be confused with license or abuse of that liberty." (R. 428.) What did the Court mean by "interference with the due administration of justice," and with "license" as distinguished from liberty? The answer is revealed by the immediately succeeding statement quoted by the court below from Chief Justice Taft's concurring opinion in *Craig v. Hecht*, 263 U. S. 255, 278, as "sustain-

ing the views just expressed"; namely, "* * *; but it is also essential that courts and judges should not be impeded in the conduct of judicial business by publications having the direct tendency and effect of obstructing the enforcement of their orders and judgment, or of impairing the justice and impartiality of verdicts. * * * If, however, the publication is intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the rendition of an imparfial verdict, or in carrying out its orders and judgment the court may, and it is its duty to, protect the administration of justice by punishment of the offender for contempt." (R. 428-429.)

In support of the conclusion that truth of the publications is no defense, the court below then quoted a portion of the opinion in *Patterson v. Colorado*, 205 U. S. 454, which condemned the publication there under review on the ground that "it would tend to obstruct the administration of justice, * * *." And as if to conclude the matter the court below quoted the rule said to be "announced" by 6 *R. C. L.*, p. 508, Sec. 20, that truth is not a defense "when the article tends to impede, embarrass or obstruct the administration of justice." (R. 431.) If it be thought that the court intended to limit such expressions to the contempt issue as tested by local law, the United States Constitution apart, we refer to this statement in the paragraph of the opinion immediately following the above: "The issue before us is not whether Judge Browning's ruling (in the forcible detainer

suit) was correct or incorrect, but whether the publications relating thereto were reasonably calculated to interfere with the due administration of justice in that case." (R. 431.) If by "the issue before us" the court meant the issue without regard to the National Constitution, the context nonetheless shows that the court's ultimate disposition of the Federal question was induced by its fixed notions about "the issue before us" as above expressed.

The issue before the court was approached by first considering and expressing approval of the rule announced in *Toledo Newspaper Co. v. United States*, 247 U. S. 402 (cited at R. 428); in *Craig v. Hecht*, and *Patterson v. Colorado*. Having announced its own adoption of the "reasonably calculated" or "inherent tendency" rule, the court acknowledged its obligation (within limits) to yield to the superior force of this Court's interpretation of the Federal Constitution, as announced in the *Bridges* case. "It becomes necessary, then," said the court, "to analyze the holding in the *Bridges* case, and, if applicable and controlling, to follow it." (R. 432.)

Having completed the analysis, which the court had approached on the footing that the *Bridges* decision "is a precedent only in cases involving similar fact situations" (R. 432) the court rejected the *Bridges* case "as precedent" on the ground that the facts were different. "These fact elements distinguish the *Bridges* case, *supra*, from the instant case and render it uncontrolling, here, on the facts." (R. 435.) "However," said the court, "the rule of 'clear and present danger,' as announced in the

*Bridges* case, *supra*, is controlling here. It is in the light of that rule, then, that we are ultimately to decide this case." *Ibid.* Thus insulated, the court proceeded to expose itself to the aura of "clear and present danger," uncontaminated by the atmosphere of *Bridges* facts.

The court dealt broadly and summarily rather than analytically with this phase of the problem. First, the court said that considering the publications in their entirety and chronologically "there is no escape from the conclusion that it was the purpose and intent of the publishers thereof to force, compel and coerce Judge Browning to grant Mayes a new trial." (R. 436.) This charge of "purpose and intent" will be further answered in the argument under Point 2, *post*, where we show, as we think, that the court's recombination of phrases has changed the contextual meaning. From this base of wrongful "purpose and intent" the court proceeded with facility to its conclusion that the publications were not only reasonably calculated to accomplish that purpose, "but there was also a 'clear and present danger' that they would and the likelihood that such result would follow was 'extremely serious' and the degree of 'imminence' extremely high.'" (R. 436.) Again, the court's conclusion rests upon what was deemed a menacing purpose:

"Such conclusions are made manifest because the publications and their purpose were to impress upon Judge Browning (a) that unless he granted the motion for a new trial he would be subjected to suspicion as to his integrity and fairness and to odium and hatred in the public mind; (b) that the safe and se-

cure course to avoid the criticism of the press and public opinion would be to grant the motion and disqualify himself from again presiding at the trial of the case; and (c) that if he overruled the motion for a new trial, there would be produced in the public mind such a disregard for the court over which he presided as to give rise to a purpose in practice to refuse to respect and obey any order, judgment or decree which he might render in conflict with the views of the public press." (R. 437.)

Let the above explanation of how the court's conclusions were "made manifest" be compared with the restatement, *per* Chief Justice White, of the conclusions of Judge Killits in *Toledo Newspaper Co. v. United States:*

"(a) Because * * * their manifest purpose was to create the impression on the mind of the court that it could not decide in the matter before it in any but the one way without giving rise to such a state of suspicion as to the integrity or fairness of its purpose and motives as might engender a shrinking from so doing. (b) Because the publications directly tended to incite to such a condition of the public mind * * * that if the court, acting according to its convictions, awarded relief, it would be subject to such odium and hatred as to restrain it from doing so. * * * And (d) because the publications were of a character, not merely because of their intemperance, but because of their general tendency, to produce in the popular mind a condition which would give rise to a purpose in practice to refuse to respect any order which the court might render if it con-

flicted with the supposed rights of the city espoused by the publications." (247 U. S. 414-415.)

The court below had previously stated that the *Bridges* decision is not binding as precedent since the facts are different. Specifying, the court said, first, "No threats are involved in the instant publications." (R. 435.) Whereas it said that in the *Bridges* case the issue turned upon the fact that the publications "carried threats of future adverse criticism and action on the part of the publishers in the event the disposition made in the case was not in keeping with the views of the publisher," all of which the judge might reasonably have expected because of the publisher's well known attitude. (R. 435.) So, we are told in effect that because there were no threats against Judge Browning, the *Bridges* case is "uncontrolling, here, on the facts"; and because there were threats against Judge Browning [as in (a), (b) and (c) above, pp. 18-19], there was "clear and present danger" and hence the *Bridges* case is uncontrolling on the law.

Another, although secondary, difference as viewed by the court, rendering the *Bridges* case "uncontrolling, here, on the facts," is said to be the presence of public interest in the Los Angeles litigation, whereas, it is said "the public, as such, had no interest in the outcome of" the detainer suit at Corpus Christi. Thus, while absence of public interest at Corpus Christi rendered the *Bridges* case uncontrolling as precedent, still the threat of public revolt if Judge Browning "overruled the motion for a new trial" was a clear and present danger that was "ex-

tremely serious" and the degree of imminence was "extremely high." (The threat of such revolt is depicted in (c) above, p. 10.) And so, we are told, the present record is at once devoid of threats and of public interest and suffused with threats, including threat of public revolt.

Support for the court's explanation of how its conclusions were "made manifest," under the head of (a), (b) and (c), above, pp. 18-19, is not to be found in either the complaint (R. 12), the county judge's findings (R. 81-83), or the articles in context (R. 359-385). If the facts were substantially identical with those in the *Toledo Newspaper* case, authority for the court's conclusions could be found, in the way above indicated, in the majority opinion in the *Toledo* case, which applied the "tendency" test. (Justices Holmes and Brandeis dissenting.) Even if it be assumed that *Nye v. United States*, 313 U. S. 33, has left in the *Toledo Newspaper* majority opinion a remnant of authoritative precedent, it can hardly be claimed that the Killits conclusions, resting upon the "tendency" doctrine, have survived both the *Bridges* and the *Pennekamp* decisions. Unless it can successfully be so claimed the judgment below is devoid of viable support.

**Point 2**

**The publications created no clear and present danger of coercing a judge having normal stamina or reasonable fortitude.**

To say that the publications complained of were dangerous to the administration of justice in the

forcible detainer suit is to imply that Judge Browning was seriously wanting in firmness of character or independence. It was not so charged, nor did either of the Texas courts so find, and the record does not show it. Besides, since it is not claimed that petitioners were aware, or sought to take advantage, of any such deficiency or weakness of the judge, the questions at issue are determinable upon the assumption that none existed. Otherwise a given publication about a case will be protected by the Constitution or not, depending upon the strength or weakness of character of the presiding judge. This means that if he is respectably so equipped the Constitution is effective. If not it is ineffective. The Constitution becomes an inconstant, meaning one thing if a given statement is made about a case pending in one court, and the opposite if made about a similar case pending in an adjoining county, or in another court in the same county.

As we view the complaint, it charges contempt "by means of" false representations. We deal with that under Point 3, where it seems more appropriate to discuss specifically the news reports. Under the present point we direct attention to the editorial. The single editorial involved, a column entitled The Crow's Nest, is reproduced in full as Appendix A, post, p. 35. The part complained of (R. 14-15) and embodied in the judgment *nisi* (R. 22-23) is in italics. The italicized part is of different import from the whole. But the difference is even wider between the natural meaning of the whole and the meaning extracted from it by the court below, as abridged and translated in its opinion (R. 436). This

part of the court's opinion we reproduce as Appendix B, post, p. 38. We respectfully submit that the court below has mistaken the meaning of the editorial, and it is apparent that its ultimate conclusion was induced by that obvious misconception, as witness: "The only reason or motive for so doing [attempting to compel Judge Browning to grant a new trial] was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint Judge Browning was wrong and they took it upon themselves to make him change his decision" (R. 436). The editorial itself says the opposite: "The Lookout, himself a layman, doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority. There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated." (R. 380, post, p. 37.)

First, the editorial advocates two reforms: (a) amendment of an archaic provision of the state constitution which permits the office of county judge to be occupied by other than a lawyer; (b) amendment of the statute conferring upon the county court final appellate jurisdiction of forcible entry and detainer suits. Since leasehold rights, without limit as to value, and irrespective of the duration of the estate, are determinable in that manner, the jurisdiction is neither petty nor simple. Obvious reasons are abundant for thinking that both reforms are overdue. Was the press at liberty, under the Constitution, to select this appropriate occasion to make

these constructive suggestions in the public interest? We submit that *Bridges v. California, supra*, at 268, answers in the affirmative.*

Second, the editorial was critical of what the author regarded as a palpable breach by Judge Browning of the duty resting upon him "to hear the other side." This, we submit, was, in the circumstances, a natural, fair-minded layman's reaction. Defendants' counsel had presented a motion for a directed verdict, upon which the judge had heard extended argument, pro and con, and had then overruled it. Plaintiffs' counsel, at a later stage, presented a motion for directed verdict, when the questions were not identical with those theretofore discussed. The judge refused to hear defendants' counsel in opposition, and granted the motion at once. This action of the judge was characterized in open court by counsel for the defendants as "arbitrary" (R. 213). For this, counsel was not reproved. The court paid no attention to it. We submit that the court was without lawful power to punish summarily the petitioners for saying in the press substantially what, the judge acquiescing, had been said by counsel in open court.

The court after referring to the publication in the

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*Compare Nelles and King, Contempt by Publication, XXVIII Columbia Law Review, at pages 552, 553: "The important doings of courts are rarely either interesting or intelligible to laymen. The time when they may best command attention is while they are going on. * * * Public discussion outside of court-rooms, at such times as it is most likely to command attention, is the nearest we have to a practical means of working for consistent judicial respectability."

news reports of resolutions passed by groups of citizens, commented that all of this was to show "that by reason of the attitude of the publishers towards Judge Browning's ruling and decision as reflected in the editorials, public opinion had become aroused and was demanding that a new trial be granted in the case because, in agreement with the viewpoint of the publishers, Judge Browning's ruling was wrong." (Appendix B, post, p. 39). The court has misinterpreted the publishers' attitude "as reflected in the editorials." There was only one. The author of the editorial carefully refrained from taking issue with Judge Browning's ruling and decision. The statement in the opinion that petitioners demanded a new trial because of their viewpoint that "Judge Browning's ruling was wrong" finds no support in, but is contradicted by, the editorial. The writer did criticize Judge Browning's method of conducting the trial. What he said was that he had no idea "whether the decision reached in this particular case is supported by legal authority." Further: "There is no way of knowing whether justice was done." The criticism was pointedly directed at the want of a fair hearing, as distinguished from an erroneous result. The writer was explicit in limiting his criticism to the violation of what he described as "the first rule of justice, giving both sides an opportunity to be heard." He stated, both affirmatively and negatively, more than once, that he did not profess to say whether the ultimate decision was right or wrong. The judgment of conviction, based upon an imagined criticism of Judge Browning's decision as being

wrong rests upon an utterly mistaken view of the facts.

The court has read into the editorial an unexpressed warning to the judge that future support would depend upon his reversing his former ruling and deciding the case the other way. The editorial carries no such threat, or effort at persuasion, subtly or otherwise. On the contrary, it tells the judge plainly enough that at all events, regardless of the outcome of the forcible detainer suit, the editorial writer, if opportunity offers, will favor the election of a competent lawyer to the office of county judge. It offers no tempting reward to Judge Browning on any terms, other than such as might emanate from his own conscience. Was this dangerous to the administration of justice? In principle the *Bridges* and *Pennekamp* decisions, and Justices Holmes and Brandeis in the *Toledo Newspaper* case have answered in the negative.

As for the resolutions adopted by the veterans organizations and kindred groups, it is not charged that these were approved editorially, or that they were misrepresented in the news columns. They expressed the opinion that the defendant, who was in the armed service, had not had a fair trial, and at least one resolution suggested that a new trial be granted and that Judge Browning then recuse himself and let an impartial judge re-try the case. The impression thus expressed accords apparently with that of a number of persons who were present at the trial; as witness the expressions and conduct of the jury in refusing, on Saturday, to sign the verdict as directed by the

court (R. 419); and was hardly more critical than were the statements of counsel for defendant made in open court without reprimand or other admonitory action by the court. (R. 217; 374.) The sponsors of at least one of these resolutions directed that it be presented to Judge Browning (R. 182), and it was mailed to and received by him (R. 224).

Finally, the interpretation placed by the appellate court upon the statement made by petitioner McCracken at the end of the contempt hearing in response to the question from the bench as to whether defendants desired to purge themselves is unwarranted. The court of appeals treated the statement as an admission of an attempt to compel Judge Browning to grant a new trial, in that the petitioner said that he did hope that the editorial would cause the judge to search his conscience, and act with greater care. If this be dangerously subversive, then the lines drawn in the *Bridges* and *Pennekamp* cases, and by Justice Holmes in the *Toledo Newspaper* case have somehow been contracted. Besides, the court's interpretation of the single expression lifted from the context of the McCracken statement is another example of the way in which petitioners have been victimized by that process throughout. For convenient reference we reproduce the whole of the statement as Appendix C, post, p. 39.

**Point 3**

**Petitioners having been convicted of contempt "by means of" allegedly false news reports, they presented a complete defense by showing that the news accounts were essentially true.**

The judgment *nisi*, after reproducing extracts from the newspapers, charged that the articles, all together, "were calculated and intended to falsely represent to the public the nature of the proceedings had, and to compel a different result on the hearing of a new trial." This was immediately followed by specific charges of false statements, misrepresentations, omissions and overemphasis. Then, that "these articles, in their entirety and standing alone and together, were wilfully and knowingly written, published and circulated by the persons aforesaid for the purpose of presenting to the reading public *by means of false statements, omissions, distortions and overemphasis*, that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen, unable because of his service to his country, to defend himself, of his rights in and to valuable property, and that counsel for plaintiffs and the court aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful." (R. 26.) (Our emphasis.)

Obviously, the false statements, omissions, distortions and overemphasis referred to in the paragraph just quoted were those which had been specified immediately preceding it in R. 24-25. The part of th

complaint above quoted is immediately followed by the concluding paragraph of the complaint, this single sentence:

"Affiant would further show the court that the purpose of this representation to the citizenry of the city of Corpus Christi and County of Nueces was intended and calculated to reflect upon the integrity of the court, and bring it into disrepute *and prejudice and influence the court in its ruling on the aforesaid motion for new trial*, and that the said publications and circulations were made for the purpose and with the intent of scandalizing the court, and intended to influence or overawe its deliberations in said pending cause, *and were made at a time and under circumstances calculated to affect the force of justice in said proceedings*, and were so calculated to do and were intended for that purpose." (Then follows immediately the judgment of guilt *nisi*. R. 26. Our Italics.)

The Court of Criminal Appeals has lifted from the last quoted paragraph the italicized parts, and, by recombining them with others, also extracted, has reconstructed what it designates a single charge, selected, so it says, from "various reasons whereby it was claimed that the articles mentioned constituted contempt of court." The so-called single charge discussed by the court is thus stated: "that the articles when taken together and considered as a whole 'were calculated and intended to falsely present to the public the nature of the proceedings had and to compel a different result on the hearing of the motion for a new trial' and to 'prejudice and influence the court in its ruling on the aforesaid motion for a new trial

* * * and were made at a time and under circumstances calculated to affect the force of justice in said proceedings * * *.'" (The omissions are the court's, not ours.) (R. 424.)

The county judge interpreted the complaint, in accord with our understanding of it as above stated, as charging contempt of court "by means of," or, as he expressed it, "by reason of" false reports. He found that the reports and editorial, "by reason of" inaccuracies, omissions, emphasis and inclusion of foreign matters, were "of a nature calculated to" accomplish the alleged wrong as specified by him. (This basic finding (R. 81) is quoted in full in the Summary Statement in the foregoing petition, page 3.)

The court below declined to consider the defense that the newspaper articles were substantially true. We recognize that truth is not a complete defense in all cases without exception. For example, no one should be permitted to apprize a jury by extra-legal means of prejudicial facts not in evidence. But this case does not fall within any such exception. Here, the gravamen of the offense as charged was the accomplishment of a wrongful end "by means of" a false report to the public of the facts of the trial.

As Judge Beauchamp's opinion suggests (R. 443-444) Judge Browning's notion that petitioners had published a misleading report of the trial of the detainer suit was induced by his erroneous conception of the controlling question of law in that case. He thought that, perforce a forfeiture provision for non-payment of monthly rental in advance, such failure to make timely payment put an end to the lease. He

erroneously gave to such forfeiture clause the effect of a provision marking the duration of the estate granted (R. 210).

Under his view of the law, the dispute could have been ended in a brief pre-trial conference, or the case could have been tried in less than an hour instead of consuming two days. This, for the reason that it was undisputed that the full amount of the monthly rental was not paid on the day when due. But it was undisputed that the default was caused by a mistake, and contributed to by the misleading conduct of others. In the circumstances equity would allow no such forfeiture. *Benavides v. Hunt*, 79 Texas 383; *Randolph v. Mitchell* (Tex. Civ. App.), 51 S. W. 297; *Creamery Dairy Co. v. Electric Park Co.* (Tex. Civ. App.), 138 S. W. 1106; *Mactier v. Osborn*, 146 Mass. 399; *Gordon v. Richardson*, 185 Mass. 492; *Cole v. Johnson*, 120 Iowa 667. Besides, under Texas law the covenant for rent was not effective to limit the term or duration of the estate. *Waggoner Estate v. Sigler Oil Co.*, 118 Texas 509.

This shows that Judge Beauchamp (R. 443-444) was right in concluding, also, that the conviction of contempt was not sustained since it was predicated upon a charge that the newspaper articles "by reason of inaccuracies, * * * were of a nature calculated * * * to coerce and compel a judgment contrary to the law and the evidence" (R. 81).

Freedom of the press, as restricted by the decision below, means that a news reporter incurs the risk of summary punishment if he fails to interpret and report the facts of the trial in accord with the notions

of the trial judge concerning the controlling questions of law. Under that abridged liberty, if the reporter, acting in good faith, interprets the facts in a way that fails to vindicate the trial judge's conclusions of law, he may be laid by the heels for contempt. The *Pennekamp* decision is contra.

**Point 4**

**The element of the judgment which imposes punishment for scandalizing the court vitiates the entire judgment.**

In the judgment *nisi* petitioners were found guilty of contempt on the ground, *inter alia*, that "said publications and circulations were made for the purpose and with the intent of scandalizing the court * * *" (R. 26). For this they were sentenced to serve three days in the county jail "unless they purge themselves thereof" (R. 26). In the final judgment of the county court petitioners were adjudged guilty of contempt because "said reports and editorial, considered in their entirety, by reason of the inaccuracies, * * * were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in Cause No. 5095 [the forcible detainer suit] * * *" (R. 81). Motion for new trial in the detainer suit was overruled on June 6, 1945 (R. 209). The judgment *nisi* in the contempt proceeding was rendered on June 4, 1945 (R. 19). The final judgment in the contempt proceeding was

rendered in August, 1945 (R. 83), after the judgment in the detainer suit had become irretrievably final at a former term of court (R. 81). At the end of the contempt hearing, and before judgment was pronounced, the county judge inquired whether the petitioners desired to purge themselves of contempt. In response to such inquiry the McCracken statement was made to the court, which he introduced by explaining that he did not know what was meant by purging in a case of that kind. The entire statement is in Appendix C, post, p. 39.

If Judge Browning was not satisfied with the McCracken statement (adopted by the other petitioners) it is obvious that what he wanted was retraction and apology. The judge's willingness to accept at that date such a purging reveals his interest in an expiation of the so-called scandalizing offense, and renders apposite this question by Mr. Justice Holmes, taken from his dissenting opinion in *Craig v. Hecht:* "how can it be pretended that the charge obstructed the administration of justice when the judge seemingly was willing to condone it if the petitioner would retract?" (263 U. S., at 281.)

There were not two separate penalties, one for supposedly obstructing justice, and the other for scandalizing the court. There was a single sentence of imprisonment for scandalizing the court and attempting to obstruct justice. Even if, contrary to fact, it be assumed that the record supports the latter, the entire judgment is vitiated by the penalty

for scandalizing the court. *Thomas v. Collins*, 323 U. S. 516, 529.

## Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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## APPENDIX A

### The Crow's Nest

**Judge and Jury**

The week-end incident in county court lends force to a frequently made argument that the judge should be a lawyer. A layman occupying its bench is bound to end up in hot water sooner or later when he is sitting on a case where fine points of law are argued. Probably the basic fault lies with the Texas constitution and statutes which vest judiciary authority in a county judge but which do not require the occupant of the office to be an attorney. The office is filled, not only in Nueces, but in many other Texas counties, by a layman.

The incident around which the present controversy rages involves such a case. Bush M. Jackson, agent, employed a technicality in seeking to break the lease of Pvt. Joe L. Mayes of the United States Army on a ground floor location in the old Elks Club building where Mayes operated a cafe. Mayes contends that his lease is still in force.

The case was heard by a jury before County Judge Joe D. Browning. Expert counsel represented the principals. About the only knowledge that Browning, a layman, has with court procedure has been gained during his occupancy of the office. Obviously, he has an even more sketchy knowledge of the points of law which opposing attorneys were arguing.

Yet he instructed the jury to return a verdict for the plaintiff. The jury twice ignored his orders and

decided for the defendant. Only when the defendant's counsel advised its members that they were obliged to follow the judge's instruction did they comply, and then with a notation that they were violating their conscience.

**One-Sided Opinion**

*Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on, especially when a man in the service of his country seems to be getting a raw deal.*

But that's not the point. A better objection to the judge's decision deals with a more fundamental issue.

When the testimony was in, the defense counsel offered a motion for an instructed verdict for his client. He was required, as is the custom, to give his authority, and arguments against were made by the plaintiff's attorney. The judge overruled the motion after hearing both sides.

*Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a change to argue against it.*

*That was the travesty on justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's no wonder that the jury balked and public opinion is outraged.*

**Knowledge Essential**

*The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances a competent layman would be better qualified, but the county judge's office is an exception. He should be a competent attorney as well as a competent businessman.*

*It's the tragedy in a case of this sort that the court where the controversial decision was handed down is the court of last resort. It's too bad that appeal can't be made to a district court and heard by a judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly.*

The Lookout, himself a layman, doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority. *There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated.*

He only knows that respect for the court's ability to mete out justice has been badly shaken, a result that can make for a dangerous condition. Qualified jurists must occupy our benches. Men of conscience must be encouraged to sit on our juries.

This column is written for the Caller by Bob McCracken. Opinions expressed are those of the writer and do not necessarily reflect the policy of this news-

paper. (R. 378. Italics indicate the part copied in the complaint, R. 14-15, and in the opinion of the court below, R. 421-422.)

## APPENDIX B

(The part of the opinion of the court below which interprets and appraises the above editorial, Appendix A)

"When the several publications in the instant case are considered together and in their chronological order of appearance, there is no escape from the conclusion that it was the purpose and intent of the publishers thereof to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint, Judge Browning was wrong and they took it upon themselves to make him change his decision. To accomplish that end, Judge Browning's action in instructing the jury, without hearing argument on the motion, was editorially denounced as a "travesty on justice" and "high handed"; as properly bringing "public opinion down on his head"; as outraging "public opinion"; as a "tragedy" that the case could not be appealed to another judge who was "able to interpret and weigh motions and arguments of opposing counsel and to make his decisions accordingly"; and as a repudiation of the "first rule of justice," as a consequence of which "there is no way of knowing whether justice was done."

Following, and in connection with, the editorials, news items were published showing that a certain group of citizens had passed a resolution denouncing the decision as a "gross miscarriage of justice." Other news items followed, showing that three different groups of citizens were petitioning or circulating petitions calling on Judge Browning to grant Mayes a new trial in the case and to "permit the case to be re-tried by another judge"—all to show that by reason of the attitude of the publishers toward Judge Browning's ruling and decision, as reflected in the editorials, public opinion had become aroused and was demanding that a new trial be granted in the case because, in agreement with the viewpoint of the publishers, Judge Browning's ruling was wrong." (R. 436.)

## APPENDIX C

[Statement made by McCracken (concurred in by the other petitioners) at the end of the contempt hearing, in response to the question by Judge Browning as to whether they desired to purge themselves] (R. 425.)

"I can speak only for myself. Without knowing the meaning of purging a contempt, especially in a case of this kind, and not being guilty of any contempt as I concede [conceive], I can only say this:

"I think that the impression created upon the mind of the public by all that was said in our papers about the Jackson-Mayes trial was the same impression that would have been created upon the mind of

an average intelligent layman who sat through the trial.

"It was the same impression that would have been created if the entire proceedings could have been published. In saying this, I do not impute unworthy motives to anyone; I do not undertake to judge motives.

"Moreover, I do not profess to know or presume to advise how the case should have been finally decided.

"It was my hope that the Crow's Nest published in the papers would quicken the conscience of the judge. I wanted him to search his conscience. It was my hope that what I said would make him more careful in discharging his duty. I think my column was calculated to have that effect upon a conscientious judge.

"As I saw it then, and as I see it now, the statements in the papers could not have the effect of overthrowing the will or undermining the conscience of the judge. They could have no such effect upon any judge worthy of the name. I assumed that the judge would understand that he, and he alone, would have to decide the law as he understood it.

"I would not bring our courts into disrepute. Indeed, in the long run, their standing before the bar of public opinion is determined by the courts—and by them alone—but I would do what I can to help them always to perform their high and solemn duties.

"If, in this instance, I have gone about it in a way that has needlessly wounded sensibilities, I am sorry for that, but I do not conceded [conceive] that anything that I have done gives your honor license to punish me for it." (R. 425.)

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DEC 10 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

# No. 241

CONWAY C. CRAIG, BOB MCCRACKEN, and TOM MULVANY,

*Petitioners,*

VS.

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

## BRIEF FOR THE PETITIONERS

MARCELLUS G. ECKHARDT,
CHARLES L. BLACK,
IRELAND GRAVES,
*Counsel for Petitioners.*

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ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

## BRIEF FOR THE PETITIONERS

### I.

### Opinion Below

The opinion below (R. 418) is unofficially reported, *Ex parte Craig, et al.*, 193 S. W. (2d) 178.

### II.

### Jurisdiction

The jurisdiction of the Court is invoked under Section 237(b) of the Judicial Code, as amended; 28 U.S.C. Section 344(b).

The judgment of the Court of Criminal Appeals of Texas to be reviewed was entered on February 13, 1946 (R. 499). Rehearing was denied on April 3, 1946 (R. 457).

Petition for certiorari was filed June 28, 1946, and granted October 14, 1946.

No right of appeal is afforded by Texas law from a judgment of contempt of court. The only available method of obtaining relief is by applying for writ of habeas corpus in an original proceeding. *Ex parte Miller*, 91 Tex. Cr. Rep. 607, 240 S. W. 944. In *Thomas v. Collins*, 323 U. S. 516, the petitioner had been held guilty of contempt for violating an order of the district court "in a civil cause." This enabled him to apply to the Supreme Court of Texas for writ of habeas corpus. Here the petitioners were not so charged, and the Texas Supreme Court had no jurisdiction to grant the writ. *Ex parte Murray Jackson*, 113 Tex. 58.* They applied to the Court of Criminal Appeals whose jurisdiction to issue the writ of habeas corpus, conferred by the Texas Constitution, Art. V, Sec. 5, is illimitable by statute. *Ex parte Miller*, 91 Tex. Cr. Rep. 607, 240 S. W. 944. As the

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*The Texas Constitution provides: "The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law." Art. V, Sec. 3.

The statute provides: "The Supreme Court or any of the Justices thereof, either in term time or in vacation, may issue writs of habeas corpus in any case where any person is restrained in his liberty by virtue of any order, process or commitment issued by any court or judge on account of the violation of any order, judgment or decree theretofore made, rendered or entered by such court or judge in any civil cause." Art. 1737, Revised Civil Statutes of 1925.

Court is aware, the Texas Court of Criminal Appeals is a court of last resort in all causes within its jurisdiction.

## III.

### Statement of the Case

By a judgment of the Court of Criminal Appeals of Texas petitioners were denied writs of habeas corpus and remanded to custody of respondent as sheriff of Nueces County, Texas, to serve three days in jail for constructive contempt of court adjudged by the county court of Nueces County. (R. 449.) Issuance of the mandate was stayed pending final action by this Court. (R. 458.)

Petitioners, Craig, publisher; McCracken, managing editor; and Mulvany, news writer, of daily newspapers published in Corpus Christi, Texas, were held guilty of contempt for publishing certain news accounts and an editorial concerning the trial of a forcible detainer suit (Jackson, et al. v. Mayes, et al.) in the county court of Nueces County. The morning Corpus Christi Caller, the afternoon Corpus Christi Times, and the Sunday Caller-Times are owned and published by the Caller-Times Publishing Company, a corporation, not a party.

No question of interfering with jury trial is involved. The charge is that the publications were intended and calculated to scandalize the judge and influence him in ruling upon the motion for new trial after he had directed a verdict for the plaintiff. Hence there was pending before the county judge the review of law questions.

In the judgment of contempt the judge found, *inter alia*, that the reports and editorial, "by reason of" inaccuracies, omissions, emphasis, and inclusion of foreign matter, were of a nature calculated to reflect upon the integrity of the court, and to "coerce and compel a judgment contrary to the law and the evidence in said cause." (R. 81.) Judge Beauchamp, dissenting, in the Court of Criminal Appeals, held that the finding was without support in that the judgment in the detainer suit was itself contrary to law. (R. 114.) This point aside, we think that the Court will be aided by viewing, at least in outline, the forcible detainer trial, from which the contempt charges emerged.

The Forcible Detainer Case, Jackson v. Mayes

Mayes, defendant, held a lease of a portion of a building in Corpus Christi, expiring March 14, 1945, with an option for an additional year at a monthly rental of $275, an increase of $25. The original covenant for rent provides that "said rentals shall be payable in advance on the first day of each month during the terms and continuance of this lease in monthly instalments of $250 at the office of the lessor in said building together with interest at the rate of 10% per annum on past due instalments until paid . . ." (R. 238.) The option provision reads: "10. Lessee has option to rent for $275.00 per month, all terms and conditions remaining the same, for one additional year." (R. 240.) The significance will later appear of the next succeeding provision, as follows: "11. In the event of the sale of the building

Lessee agrees to surrender his lease at the option of the purchaser, on or after March 14, 1944." (R. 240.)

The premises were not sold, and Mayes desired to exercise his option. But because he failed to pay $275 by March 14, 1945, as rent for the first month, Judge Browning ruled that he had failed to exercise his opinion. (R. 219.)

Mayes left Corpus Christi for Camp Hood (some 300 miles distant) on January 17, 1945, and was there inducted into the Army two days later. He had committed his business to Burchard by a power of attorney. Burchard, not knowing that the lease called for an increase in rent, sent to Jackson on March 14, 1945, a check for $250 as rent for the first month of the extended term. The check was retained by Jackson without word of any kind to Burchard until March 19th, when an attorney for some of the lessors informed him that the lease called for $275 monthly rental, and that Mayes had lost his rights. The $250 check was on that day returned to Burchard by the attorney with a letter requesting surrender of possession. (R. 261.) On March 21st, the day after receipt of the letter, Burchard forwarded to Jackson by mail a check for $275 with notation indicating that it was rent to April 14, 1945, and by inadvertence he dated the check April 21, not March 21, 1945. (R. 263-264, 273.) After Jackson had retained the check for three weeks, it was mailed back to Burchard on April 13, 1945 by the attorney who, on April 20, 1945, filed the suit for possession. (R. 203.) Defendant tendered the rent due to date in the justice court, and in the county court (R. 283).

The owners of the building (Jackson, Flato and Heaney) from whom Mayes held his lease, six months prior to that time had leased the building (including the Mayes portion) to one Mason for a term of five years beginning October 1, 1944. The lease was made expressly subject to the Mayes lease, but Mason thereby became entitled to receive the Mayes rents, and the original lessors thenceforth were not affected by, or interested in, what Mayes did about his option (R. 341).

Mayes, however, was not informed of the lease to Mason. Jackson continued until March 1945 to accept the Mayes checks, which he endorsed for deposit, as before, to his own credit in the bank (R. 251) and then accounted to Mason. (R. 345.)

About the last of February, 1945, Burchard was informed by Mason that he had "gotten possession" of the property. To Burchard's statement, "Well, we would like to stay on," Mason replied: "No, we have to have the use of it." (R. 352.) By this he must have intended to inform Burchard that he had bought the property, since otherwise he had no right to demand possession. Burchard understood that if Mason had bought the building Mayes had no option, but he doubted Mason's statement, and for two weeks he endeavored to find Jackson and to get a copy of the Mayes lease in order to ascertain more definitely his rights. Jackson's office reported that he was out of town, and Burchard, on March 14, 1945, forwarded to Jackson the usual rent check. (R. 270.)

Mayes operated in the premises what he called the

Playboy Cafe, where he sold beer and "some food." (R. 228.) Plaintiff's counsel referred to it as a beer saloon (R. 228.) Mason was a more extensive operator. Former proprietor of the Dragon Grill, he was interested in a so-called novelty company, operating cigarette machines, phonographs, marble tables ("without the pay-off"), and at an earlier period, slot machines. (R. 354-355.) He testified that he was also in the real estate business.

Late Saturday afternoon, at the end of two days in trial of the detainer suit, Judge Browning directed the jury to return a verdict for plaintiff, and for that purpose handed them a form to be signed by the foreman. The jury soon returned with a verdict for defendant. (R. 214.) The judge sent them back with a second peremptory instruction and form of verdict Again they returned, repeating what they had done, adding: "Unanimous verdict on first ballot, in favor of the defendant." (R. 216.) Again the judge sent them back, with an attempted explanation that in the circumstances the jury was in duty bound to follow instructions. This was about 9:30 p.m. A short time later the judge, having ascertained that the jury were not ready to comply, recessed the court until Sunday morning, and the jury retired for the night in charge of the bailiff. At 9 o'clock Sunday morning the jury again reported noncompliance. The judge then threatened to keep them in custody until they obeyed, whereupon counsel for defendant in open court thanked them for what they had done, and advised them of the futility of holding out longer. Shortly they brought in a verdict for plaintiff stating

that it was "with the orders of the court against the conscience of this jury." (R. 218.)

Although in the charge of contempt complaint was made of the press account of the above mentioned remarks of counsel to the jury (R. 13), the parties stipulated at the contempt trial (R. 217) that this and other proceedings, above outlined, as they occurred Saturday evening and Sunday morning were correctly reported in the papers of Sunday and Monday morning. That is, in the Caller-Times of Sunday, May 27, 1945 (R. 362-364), and in the Caller of Monday, May 28th (R. 371-384).

On May 29th, motion for new trial was filed (R. 208) and, after argument pro and con, was overruled on June 6, 1945 (R. 209). The Jackson-Mayes detainer suit was thus finally disposed of before the contempt matter was heard.

## Contempt Proceedings

Meanwhile, on June 4, 1945, the complaint was filed charging contempt of court (R. 12), and on the same day (R. 19) the county judge entered an order, in form of a judgment *nisi*, directing that petitioners be cited, by *scire facias*, to show cause on June 8, 1945, why the judgment *nisi* should not be made final. (R. 26.) The time having been extended, petitioners filed separate answers on July 24, 1945 (Craig, R. 27; McCracken, R. 43; Mulvany, R. 62.) After an interim between court terms the contempt trial began before Judge Browning on August 1, 1945, and was concluded and final judgment of contempt was rendered August 3, 1945 (R. 79). Later

on that day petitions for writs of habeas corpus were presented to the Presiding Judge of the Court of Criminal Appeals who, in vacation, granted bail on temporary writs made returnable to the Court at the October, 1945 Term. (R. 10-11.)

The affidavit by which the contempt proceeding was instituted, referred to in the record as the Complaint (R. 12), was embodied *in toto* on the same day in the following

Judgment *Nisi* (R. 19-27).

"This the 4th day of June, 1945, it appearing to the satisfaction of the court that from the affidavit of Newt Wright, an officer of this court, that Conway C. Craig, Bob McCracken and Tom Mulvaney, who reside in Nueces County, Texas, are guilty of contempt of this court in the following respects:

"That while this honorable court was in regular session, having been called on the 21st day of May, 1945, there was pending before the said court for judicial determination cause No. 3624, wherein B. M. Jackson, Franklin Flato, Frederick Flato and Harry G. Heaney were plaintiffs, and Joe L. Mayes, and F. F. Burchard were defendants; that said cause was on appeal to this honorable court by the defendants from a judgment for the plaintiffs in Justice Court for Place 2, Precinct 1, of this county, and came on trial de novo on the 25th day of May, 1945; and that the court did, after having impaneled a jury and heard the evidence on the said cause and on a motion of the plaintiffs, instruct the jury to return a verdict for the plaintiffs and against the defendants; and the jury having on the 27th day of May, 1945, pursuant to such instruction, returned the said verdict, the court rendered judgment for the plain-

tiffs, to which judgment the defendants did then and there in open court except; that on the 29th day of May, 1945, the defendants timely filed their motion for a new trial in said cause, and that said motion was set for hearing at 9 AM on the 6th day of June, 1945, and that said cause, at the time the hereinafter complained acts were done and this affidavit is made, is still pending before this court.

"Affiant would further show that he is interested in said cause by virtue of being an officer of the said court. Affiant would further show the court that on the dates hereinafter shown Conway C. Craig, publisher of the Corpus Christi Caller, the Corpus Christi Times, and the Corpus Christi Caller-Times, the first two named being daily newspapers of general circulation in the City of Corpus Christi and County of Nueces where the cause aforesaid is now pending, and the Corpus Christi Caller-Times being a Sunday newspaper of general circulation in the City and County aforesaid, together with Bob McCracken, an editorial writer, and Tom Mulvaney, a news writer, of the newspapers aforesaid, did knowingly and wilfully, without justification or excuse, when they could and should have done otherwise, write, publish and circulate, the hereinafter purported factual news stories and editorial comments.

"On the 26th day of May, 1945, in the Corpus Christi Caller, there was published a purported news story which included the statement

> 'that Burchard further claimed that although he had not known of the option clause, when he learned of it he immediately proffered a check for $275.00 rental';

that on the 27th day of May, 1945, in the Corpus Christi Caller-Times, there was written, published

and circulated a purported news story of proceedings had that included the following statement:

> 'At 7 PM Browning, without listening to argument from counsel for either side on the plaintiff's motion presented by Dudley Tarlton for Jackson, and without giving the Six-man jury opportunity to weigh the evidence, instructed the jury to find against Mayes. W. M. Lewright, Mayes' attorney, protested that the court's arbitrary action had ruled that Tarlton's "one-page motion" did not need supporting argument and citation of authorities';

"That on the 28th day of May, 1945, there was written, published and circulated in the Corpus Christi Caller an article which contained the following language:

> 'Browning accepted Tarlton's one-page motion, and without permitting argument or citation of authorities to support the motion, ruled that it be granted. The effect of this ruling was that Browning took the matter from the jury.'

"That said article also included the following speech made by Walter Lewright, of counsel for the defendants:

> 'However, I now advise you that under the law, Judge Browning has the right to compel you, even against the dictates of your conscience, to sign the verdict he has ordered. As a matter of fact, it is probable that he has the power to put you in jail until such time as you do sign it, and I rather imagine, from what has heretofore taken place in this trial, that unless you do

sign the verdict, he will cause you to be put in jail. As I and my clients feel that you have done all in your power to register your protest and revulsion of feeling at the effect of this decision reached by Judge Browning; as you are helpless to do anything further; and as making you suffer by remaining locked up will not do us a bit of good, I suggest that you sign the verdict and return to your homes with a clear conscience of having done all that you could to protect the rights of the man whom I feel, and evidently you feel, has been done a gross injustice.

'While we have no appeal from the court's decision in this case, we do have the right to appeal to his conscience by presenting a motion for new trial in this action—and which motion we will file and argue strenuously with the hope that in the meantime he will see the error committed and will rectify the same. There cannot be any doubt but that the action of you men in registering your protest against this decision, as you have done, will affect him. At least, I can only hope that it will. I sincerely thank you.'

"That on the 30th day of May, 1945, in an article written by the aforesaid Bob McCracken, and published and circulated in the Corpus Christi Caller under the editorial masthead, The Crow's Nest, there was contained the following language:

'Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on; espe-

cially when a man in the service of his country seems to be getting a raw deal.'

"And further:

'Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a chance to argue against it.

'That was the travesty on justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's no wonder that the jury balked and public opinion is outraged.

'The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where the fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances, a competent layman would be better qualified, but the county judge's office is an exception. He should be a competent attorney as well as a competent businessman.

'It's a tragedy in a case of this sort that the court where the controversial decision was handed down in the court of last resort. It's too bad that appeal can't be made in a district court and heard by a judge who is familiar with proper procedure and able to

interpret and weigh motions and arguments by opposing counsel, and make his decisions accordingly.'

"And further:

'There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated.'

"That on the same 30th day of May, 1945, in the same issue of the Corpus Christi Caller, there appeared what purported to be a report of action taken by the Sailor's and Soldier's Advisory Council of Corpus Christi, the said action reported to have been the passage of a resolution

'labeling County Judge Joe D. Browning's order for a directed verdict against Mayes a "gross miscarriage of justice."'

"The said article further states that

'The council's resolution called on Browning to grant Mayes a new trial on the grounds that he had committed an error in instructing the jury to find for the plaintiff. The petition asked that Browning, upon granting the new trial, should disqualify himself to further sit as judge in the case, and should permit the case to be re-tried before another judge and jury.'

"And further:

"'The trial reached a climax Saturday night when Browning, on motion of Dudley Tarlton, Jackson's counsel, and without argument or citation of authorities, instructed the six-man County Court jury to find for Jackson. The jury twice refused,

both times bringing in verdicts in favor of Mayes and against Jackson. Browning had the jury confined to the courthouse jury room all Saturday night. Sunday morning when the court convened, the jury reported that it still had not signed the verdict in favor of Jackson. Browning announced that he would lock the jury up until Monday morning. However, Walter M. Lewright, advised the jurymen, that they should not continue to "suffer" any longer, and should sign the verdict, since Browning had a legal right to force them to do so. The jury signed the verdict, but appended a statement asserting that they did so under pressure.'

"That on the 31st day of May, 1945, there was written, published and circulated by the persons aforesaid in the Corpus Christi Caller a purported news story, which said:

'Three local groups were reported to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy Cafe suit.

'One petition is reportedly being drawn by a parents and teachers' group, another by a service mothers' group, and the third is being drawn for independent circulation among parents of men in service.

'The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi Soldier's and Sailor's Advisory Council Tuesday night. This petition called on Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under an-

other judge and jury. Action on the petitions is expected shortly.

'The council's petition, drawn by five veterans' organizations with a membership of more than 1,000, followed by a few hours the filing of a motion for new trial by Walter M. Lewright and LeGrand Woods, Mayes' counsels.'

"The article also contained the following language:

'It came to a climax Sunday when Browning Saturday night accepted without argument or citation of authority a motion by Dudley Tarlton, Jackson's lawyer, for an instructed verdict.'

"The same article said further:

'The jury was kept Saturday night in the courthouse. Sunday morning, following a threat by Browning to keep the jury together until they did sign, the jurymen signed the verdict, appending a statement that they did so against the dictates of their conscience.'

"Affiant would further state that the articles aforesaid, in their entirety and considered together, were calculated and intended to falsely present to the public the nature of the proceedings had, and to compel a different result on the hearing of a new trial; that the said articles falsely stated that Mayes was an ex-insurance man, when in truth and in fact his principal business during the time the said cause was pending was and is in the insurance business.

"The said articles, and all of them, failed to state the terms of the contract declared on by plaintiffs; they failed to state that the check which the defend-

ant Burchard testified he had proffered was tendered seven days late, and that the said check was postdated 30 days from the date tendered, and could not, in consequence, be considered a legal tender of rent money.

"The said articles omitted to state that the arrangements under which the premises were operated had been in existence for some months before the defendant was inducted into the Army. The said articles failed to state the legal grounds upon which plaintiffs' motion for an instructed verdict was urged and granted, but referred to it in a derogatory manner, in quotations, as a 'one-page motion.' That the articles omitted much material evidence that would have enabled the public generally to form a fair estimate of the real nature of the controversy; that the articles failed and omitted the names of the principal plaintiffs, who are highly respected business and professional men of Corpus Christi, Texas; that the articles needlessly repeated and emphasized the fact that the defendant Mayes was in the armed service; that the articles, repeated, reiterated and overemphasized the court's insistence that the verdict be returned in accordance with its instructions; that the articles needlessly repeated, reiterated and over-emphasized the fact that no argument was heard on plaintiffs' motion, and gave no prominence to the fact that defendant's motion for an instructed verdict was argued by defendant's counsel for ninety minutes, and that ruling on that motion was held in abeyance until all the evidence was in.

"That the articles failed to state that the jury had no right to conclude what the law might be upon the proof of any given set of facts, but that they were duty bound to receive the law from the court; that the articles failed to state that the court was under no duty to hear arguments or the citation of authorities from either party, and that remarks of counsel

for the defendants were set forth verbatim and given prominence, while remarks of counsel for the plaintiffs were omitted or given no prominence.

"Affiant would further show the court that these articles, in their entirety and standing alone and together, were wilfully and knowingly written, published and circulated by the persons aforesaid for the purpose of presenting to the reading public by means of false statements, omissions, distortions and over-emphasis, that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen, unable because of his service to his country, to defend himself, of his rights in and to valuable property, and that counsel for plaintiffs and the court aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful.

"Affiant would further show the court that the purpose of this representation to the citizenry of the City of Corpus Christi and County of Nueces was intended and calculated to reflect upon the integrity of the court, and bring it into disrepute and prejudice and influence the court in its ruling on the aforesaid motion for a new trial, and that the said publications and circulations were made for the purpose and with the intent of scandalizing the court, and intended to influence or overawe its deliverations in said pending cause, and were made at a time and under circumstances calculated to affect the force of justice in said proceedings, and were so calculated to do and were intended for that purpose.

"Affiant would further show the court that the said Conway C. Craig, Bob McCracken and Tom

Mulvaney, are, by reason of the said writing, publication and circulation, guilty of contempt of this court.

"It is, therefore, ordered, adjudged and decreed by the court that the said Conway C. Craig, Bob McCracken and Tom Mulvaney be and they are hereby held guilty of contempt as aforesaid, and that they be punished by confinement in the County Jail of Nueces County, Texas, for three days, unless they purge themselves thereof.

"It is further ordered that the said Conway C. Craig, Bob McCracken and Tom Mulvaney be cited by scire facias to appear before said court at the Courthouse in Corpus Christi, Texas, on the 8th day of June, 1945, at 9:30 AM, then and there to show cause why this judgment should not be made final and absolute against them, and that a certified copy of such affidavit and of this judgment be served upon them, together with a copy of such scire facias.

"Joe D. Browning, Judge of the County Court of Nueces County, Texas." (R. 19-27.)

Final Judgment of Contempt

In the final judgment of contempt of August 3, 1945, Judge Browning found

"that the said reports and editorial, considered in their entirety, by reason of inaccuracies contained therein, material matters omitted therefrom, emphasis on matters of evidence adduced at the trial of Cause No. 3624, and the inclusion in said articles and editorial of matters foreign to the record in said cause, were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in cause No. *5095*, to coerce and compel a judgment

contrary to the law and the evidence in said Cause No. *5095* and to block the administration of justice, and that the said news reports and editorial were intended so to do." (R. 81-82.)

Following the finding thus made applicable to the three petitioners the court made three distinct findings, each relating to one petitioner, stating his connection with and responsibility for the publications. (R. 82-83.)

These were followed by a final paragraph adjudging that petitioners are in contempt of court, assessing their punishment at 3 days in jail, and taxing all costs against them. This made final the judgment *nisi*, omitting the "unless they purge themselves thereof" (R. 83).

## Judge Browning's View

Aside from those relating to the editorial, the differences between the petitioners and Judge Browning are attributable in large part to their divergent views touching the significance and relative importance of the facts of the detainer suit. As Judge Browning viewed it, when Mayes failed to pay $250 before March 15, 1945, as rent for the first month of the extended term he failed to exercise his option, and his leasehold expired. Obviously, under that view, the bulk of the evidence was irrelevant and of no legal significance. To the layman it seemed important that Mayes, while he was in the army, had been made the victim of an unintentional failure on the part of his agent to pay rent *ad diem*, and that he actually tried and intended to keep his lease in force. Judge Browning failed to perceive that the layman's

view was also the correct view, legally; that, under applicable rules of equity, Mayes was entitled to prevail.

The three petitioners, after presenting their constitutional defenses (R. 27, 43, 62) answered fully. They denied an intent to reflect upon the integrity of the court or to influence the court or that the publications were calculated and intended to affect the course of justice. (R. 34, 50, 69.) They denied and answered specifically and affirmatively each of the charges of false reporting and distortion of the record. (R. 33, 48, 68.) Each attached to his answer exhibits reproducing in full the news accounts and the editorial copied in part in the contempt complaint. (R. 32, 48, 68.) These exhibits, C-26, T-26, C-T-27, C-28, T-28, C-29, T-29, C-30, T-30, and T-31, appear at R. 362-386. Other newspaper accounts (R. 387-418) were not complained of. Indeed, the Court of Criminal Appeals correctly construed the complaint as embracing no published matter other than that set forth in the complaint.

## IV.

## Specification of Errors

The Court of Criminal Appeals erred:

1. In holding the petitioners guilty of contempt by applying the inapplcable rule of *Toledo Newspaper Co. v. United States*, 247 U. S. 205, and in not applying the Constitution as expounded in *Bridges v. California*, 314 U. S. 252, and *Pennekamp v. Florida*, 90 L. Ed. 1001 (June 3, 1946).

2. In adjudging petitioners guilty of contempt,

notwithstanding the fact that the publications created no clear and present danger of coercing a judge having reasonable fortitude or normal strength of character.

3. In holding that truth of the publications was not a defense to a charge of contemning the court "by means of" false news reports.

4. In upholding a summary punishment for an alleged scandalizing of the court.

5. In refusing to discharge the petitioners since the publications complained of were within the protection of the freedom of the press guaranteed by the 14th and 1st Amendments to the United States Constitution.

## V.

### Summary of Argument

Point 1. The decision of the Court of Criminal Appeals of Texas upholding the conviction of petitioners for contempt of court has deprived the petitioners of their right of freedom of the press guaranteed by the Fourteenth and First Amendments of the National Constitution as construed by this Court in *Bridges v. California*, 314 U. S. 252 (1941), and in *Pennekamp v. Florida* (No. 473, October Term, 1945, decided June 3, 1946), 66 S. Ct. 1029, 90 L. Ed., Adv. Op., 1001. While acknowledging the binding force of the "clear and present danger" test,

the court below has not applied it, but instead has applied the "tendency" test as announced and applied in *Toledo Newspaper Co. v. United States*, 247 U. S. 402.

Point 2. There was no contempt of court since the publications created no clear and present danger of coercing a judge having reasonable fortitude or normal strength of character.

Point 3. Petitioners were charged with having contemned the court "by means of" false news reports (R. 18; 26). This was the basis of the judgment of conviction (R. 81). In these circumstances the petitioners presented a complete defense by showing that the news accounts were essentially true.

Point 4. The punishment was imposed, at least in part, for scandalizing the court. This vitiates the entire judgment. *Thomas v. Collins*, 323 U. S. 516, 529.

## VI.

## ARGUMENT

### Point I

**Petitioners have been deprived of their right of freedom of the press guaranteed by the United States Constitution in that, under the guise of applying the "clear and present danger" test the court below has applied against them the "tendency" test and has decided the case on the theory of Toledo Newspaper Company v. United States, 247 U. S. 402.**

Following its statement of facts (R. 418-427) the Court of Criminal Appeals, in answer to the question "Do such publications authorize the contempt judgment," stated that by its own decisions the question is tested by the "reasonable tendency" rule. The Court then quoted from the opinion in *Craig v. Hecht*, 236 U. S. 255, and and a brief portion of the opinion in *Patterson v. Colorado*, 205 U. S. 454, referring specifically to "a publication likely to reach the eyes of a jury" and condemning it on the ground that "it would tend to obstruct the administration of justice." After then referring to the rule said to be announced in 6 R.C.L., p. 508, Sec. 20, that truth is not a defense "when the article tends to impede, embarrass or obstruct the administration of justice," the Court said: "The issue before us is not whether Judge Browning's ruling [in the forcible detainer suit] was correct or incorrect, but whether the publications relating thereto were reasonably calculated to interfere with the due administration of justice in that case." (R. 431.) If by "the issue before us" the Court meant the issue without regard to the National Constitution, the context nonetheless shows that the Court's ultimate disposition of the Federal question was induced by its fixed notions about "the issue before us" as above expressed.

The issue before the Court was approached by first considering and expressing approval of the rule announced in *Toledo Newspaper Co. v. United States*, 247 U. S. 402 (cited at R. 428); in *Craig v. Hecht*, and *Patterson v. Colorado*. Having announced its own adoption of the "reasonably calculated" or "in-

herent tendency" rule, the Court acknowledged its obligation (within limits) to yield to the superior force of this Court's interpretation of the Federal Constitution, as announced in the *Bridges* case. "It becomes necessary, then," said the Court, "to analyze the holding in the *Bridges* case, and, if applicable and controlling, to follow it." (R. 432.)

Having completed the analysis, which the Court had approached on the footing that the *Bridges* decision "is a precedent only in cases involving similar fact situations" (R. 432) the Court rejected the *Bridges case* "as precedent" on the ground that the facts were different. "These fact elements distinguish the *Bridges* case, *supra*, from the instant case and render it uncontrolling, here, on the facts." (R. 435.) "However," said the Court, "the rule of 'clear and present danger,' as announced in the *Bridges* case, *supra*, is controlling here. It is in the light of that rule, then, that we are ultimately to decide this case." *Ibid.* Thus insulated, the Court proceeded to expose itself to the aura of "clear and present danger," uncontaminated by the atmosphere of *Bridges* facts.

Having declared with unconcealed reluctance that it would follow the *Bridges* case "if applicable and controlling," the Court analyzed the facts of that case, and thence proceeded with facility to its conclusions that here there was clear and present danger, and that the degree of imminence was "extremely high." (R. 436.) The Court stated definitely how such conclusions were arrived at, by saying:

"Such conclusions are made manifest because the publications and their purpose were to impress upon Judge Browning (a) that unless he granted the motion for a new trial he would be subjected to suspicion as to his integrity and fairness and to odium and hatred in the public mind; (b) that the safe and secure course to avoid the criticism of the press and public opinion would be to grant the motion and disqualify himself from again presiding at the trial of the case; and (c) that if he overruled the motion for a new trial, there would be produced in the public mind such a disregard for the court over which he presided as to give rise to a purpose in practice to refuse to respect and obey any order, judgment or decree which he might render in conflict with the views of the public press." (R. 437.)

Whence came the basis for such "manifest conclusions? The *Toledo Newspaper* case supplies the answer:

"(a) Because * * * their manifest purpose was to create the impression on the mind of the court that it could not decide in the manner before it in any but the one way without giving rise to such a state of suspicion as to the integrity or fairness of its purpose and motives as might engender a shrinking from so doing. (b) Because the publications directly tended to incite to such a condition of the public mind * * * that if the court, acting according to its convictions, awarded relief, it would be subject to such odium and hatred as to restrain it from doing so. * * * And (d) because the publications were of a character, not merely because of their intemperance, but because of their general tendency, to produce in the popular mind a condition which would give rise to a purpose in practice to refuse to respect any order which the court might render if it conflicted with the supposed rights of the city espoused by the publications." (247 U. S. 414-415.)

It thus appears that while the Court was at pains to point out what were regarded as the distinctive facts of the *Bridges* case, the Court was content to deal broadly and summarily, rather than analytically, with the facts of the present case. In this way the Court fell into the twofold error of assuming the existence of an exact parallel between the present case and the *Toledo* case on the facts, and between the *Toledo* case and the *Bridges* and *Pennekamp* cases on the law.

The court below had previously stated that the *Bridges* decision is not binding as precedent since the facts are different. Specifying, the Court said, first, "No threats are involved in the instant publications." (R. 435.) Whereas it said that in the *Bridges* case the issue turned upon the fact that the publications "carried threats of future adverse criticism and action on the part of the publishers in the event the disposition made in the case was not in keeping with the views of the publisher," all of which the judge might reasonably have expected because of the publisher's well known attitude. (R. 435.) So, we are told in effect that because there were no threats against Judge Browning, the *Bridges* case is "uncontrolling here, on the facts"; and because there were threats against Judge Browning [as in (a), (b) and (c) above, p. 26], there was "clear and present danger" and hence the *Bridges* case is uncontrolling on the law.

Another, although secondary, difference as viewed by the Court, rendering the *Bridges* case "uncontrolling, here, on the facts," is said to be the presence of

public interest in the Los Angeles litigation, whereas, it is said "the public, as such, had no interest in the outcome of" the detainer suit at Corpus Christi. Thus, while absence of public interest at Corpus Christi rendered the *Bridges* case uncontrolling as precedent, still the threat of public revolt if Judge Browning "overruled the motion for a new trial" was a clear and present danger that was "extremely serious" and the degree of imminence was "extremely high." (The threat of such revolt is depicted in (c) above, p. 26.) And so, we are told, the present record is at once devoid of threats and of public interest and suffused with threats, including threat of public revolt.

Support for the Court's explanation of how its conclusions were "made manifest," under the head of (a), (b) and (c) above, p. 26, is not to be found in either the complaint (R. 12), the county judge's findings (R. 81-83), or the articles in context (R. 359-386). If the facts were substantially identical with those in the *Toledo Newspaper* case, authority for the Court's conclusions could be found, in the way above indicated, in the majority opinion in the *Toledo* case, which applied the "tendency" test. (Justices Holmes and Brandeis dissenting.) Even if it be assumed that *Nye v. United States*, 313 U. S. 33, has left in the *Toledo Newspaper* majority opinion a remnant of authoritative precedent, it can hardly be claimed that the Judge Killits conclusions, resting upon the "tendency" doctrine, have survived both the *Bridges* and the *Pennekamp* decisions. Unless it can successfully be so claimed the judgment below is devoid of viable support.

## Point 2

**The publications created no clear and present danger of coercing a judge having normal stamina or reasonable fortitude.**

"The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess any more than it generally can depend on the personal equations or individual idiosyncracies of the tort-feasor." *Pennekamp v. Florida*, 66 S. Ct. at 1038; 90 L. Ed. (Adv. Op.) at 1010.

This principle was not taken into account by the Court of Criminal Appeals.

To say that the publications complained of were dangerous to the administration of justice in the forcible detainer suit is to imply that Judge Browning was seriously wanting in firmness of character or independence. It was not so charged, nor did either of the Texas courts so find, and the record does not show it. Besides, since it is not claimed that petitioners were aware, or sought to take advantage, of any such deficiency or weakness of the judge, the questions at issue are determinable upon the assumption that none existed. Otherwise a given publication about a case will be protected by the Constitution or not, depending upon the strength or weakness of character of the presiding judge. This means that if he is respectably so equipped the Constitution is effective. If not it is ineffective. The Constitution

becomes an inconstant, meaning one thing if a given statement is made about a case pending in one court, and the opposite if made about a similar case pending in an adjoining county, or in another court in the same county.

The complaint charges contempt "by means of" false representations. We deal with that under Point 3, where it seems more appropriate to discuss specifically the news reports. Under the present point we direct attention to the editorial. The single editorial involved, a column entitled The Crow's Nest, is reproduced in full as Appendix A, *post*, p. 54. The part complained of (R. 14-15) and embodied in the judgment *nisi* (R. 22-23) we indicate by italics. The italicized part is of different import from the whole. But the difference is even wider between the natural meaning of the whole and the meaning extracted from it by the court below, as abridged and translated in its opinion (R. 436). This part of the Court's opinion we reproduce as Appendix B, *post*, p. 57. We respectfully submit that the court below has mistaken the meaning of the editorial, and it is apparent that its ultimate conclusion was induced by that obvious misconception, as witness: "The only reason or motive for so doing [attempting to compel Judge Browning to grant a new trial] was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint Judge Browning was wrong and they took it upon themselves to make him change his decision" (R. 436) The editorial itself says the opposite:

"The Lookout, himself a layman, doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority. There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated." (R. 380, *post*, p. 56.)

First, the editorial advocates two reforms: (a) amendment of an archaic provision of the State Constitution which permits the office of county judge to be occupied by a layman; (b) amendment of the statute conferring upon the county court final appellate jurisdiction of forcible entry and detainer suits. Since leasehold rights, without limit as to value, and irrespective of the duration of the estate, are determinable in that manner, the jurisdiction is neither petty nor simple. Obvious reasons are abundant for thinking that both reforms are overdue. Was the press at liberty, under the Constitution, to select this appropriate occasion to make these constructive suggestions in the public interest? We submit that *Bridges v. California, supra*, at 268, answers in the affirmative.*

Second, the editorial was critical of what the author regarded as a palpable breach by Judge Brown-

*Compare Nelles and King, Contempt by Publication, XXVIII Columbia Law Review, at pages 552, 553: "The important doings of courts are rarely either interesting or intelligible to laymen. The time when they may best command attention is while they are going on. * * * Public discussion outside of court rooms, at such times as it is most likely to command attention, is the nearest we have to a practical means of working for consistent judicial respectability."

ing of the duty resting upon him "to hear the other side." This, we submit, was, in the circumstances, a natural, fair-minded layman's reaction. Defendants' counsel had presented a motion for a directed verdict, upon which the judge had heard extended argument, pro and con, and had later overruled it. Plaintiffs' counsel, at a later stage, presented a motion for directed verdict, when the questions were not identical with those theretofore discussed. The judge refused to hear defendants' counsel in opposition, and granted the motion at once. This action of the judge was characterized in open court by counsel for the defendants as "arbitrary" (R. 213). For this, counsel was not reproved. The court paid no attention to it. We submit that the court was without lawful power to punish summarily the petitioners for saying in the press substantially what, the judge acquiescing, had been said by counsel in open court.

The Court after referring to the publication in the news reports of resolutions passed by groups of citizens, commented that all of this was to show "that by reason of the attitude of the publishers towards Judge Browning's ruling and decision as reflected in the editorials, public opinion had become aroused and was demanding that a new trial be granted in the case because, in agreement with the viewpoint of the publishers, Judge Browning's ruling was wrong." (Appendix B, *post*, p. 58.) The Court has misinterpreted the publishers' attitude "as reflected in the editorials." There was only one. The author of the editorial carefully refrained from taking issue

with Judge Browning's ruling and decision. The statement in the opinion that petitioners demanded a new trial because of their viewpoint that "Judge Browning's ruling was wrong" finds no support in, but is refuted by, the editorial. The writer did criticize Judge Browning's method of conducting the trial. What he said was that he had no idea "whether the decision reached in this particular case is supported by legal authority." Further: "There is no way of knowing whether justice was done." The criticism was pointedly directed to the denial of an adequate hearing, as distinguished from an erroneous result. The writer was explicit in limiting his criticism to the violation of what he described as "the first rule of justice, giving both sides an opportunity to be heard." He stated, both affirmatively and negatively, more than once, that he did not profess to say whether the ultimate decision was right or wrong. The judgment of conviction, based upon an imagined criticism of Judge Browning's decision as being wrong rests upon an utterly mistaken view of the facts.

The Court has read into the editorial an unexpressed warning to the judge that future support would depend upon his reversing his former ruling and deciding the case the other way. The editorial carries no such threat, or effort at persuasion, subtly or otherwise. On the contrary, it tells the judge plainly enough that at all events, regardless of the outcome of the forcible detainer suit, the editorial writer, if opportunity offers, will favor the election of a competent lawyer to the office of county judge. It offers no tempting reward to Judge Browning on

any terms, other than such as might emanate from his own conscience. Was this dangerous to the administration of justice? In principle the *Bridges* and *Pennekamp decisions*, and Justices Holmes and Brandeis in the *Toledo Newspaper* case have answered in the negative.

As for the resolutions adopted by the veterans organizations and kindred groups, it is not charged that these were approved editorially, or that they were misrepresented in the news columns. They expressed the opinion that the defendant, who was in the armed service, had not had a fair trial, and at least one resolution suggested that a new trial be granted and that Judge Browning then recuse himself and let an impartial judge re-try the case. The impression thus expressed accords apparently with that of a number of persons who were present at the trial; as witness the expressions and conduct of the jury in refusing, on Saturday, to sign the verdict as directed by the court *(ante*, p. 7); and was not more critical than were the statements of counsel for defendant made in open court without reprimand or other admonitory action by the court. (R. 217; 374). The sponsors of at least one of these resolutions directed that it be presented to Judge Browning (R. 182), and it was mailed to and received by him (R. 224).

Finally, the interpretation placed by the Court of Criminal Appeals upon the statement made by petitioner McCracken at the end of the contempt hearing in response to the question from the bench as to whether defendants desired to purge themselves is unwarranted. The Court treated the statement as

an admission of an attempt to compel Judge Browning to grant a new trial, in that the petitioner said that he did hope that the editorial would cause the judge to search his conscience, and act with greater care. If this be dangerously subversive, then the area of freedom defined by the lines drawn by the Court in the *Bridges* and *Pennekamp* cases, and by Justices Holmes and Brandeis in the *Toledo Newspaper* case has somehow been contracted. Something did prompt the judge to hear argument on the motion for new trial (R. 209). Finally, the Court's interpretation of the single expression lifted from the context of the McCracken statement is another example of the way in which petitioners have been victimized by that process throughout. For convenient reference we reproduce the whole of the statement as Appendix C, *post*, p. 58.

## Point 3

**Petitioners having been convicted of contempt "by means of" allegedly false news reports, they presented a complete defense by showing that the news accounts were essentially true.**

The judgment *nisi*, after reproducing abstracts from the newspapers, charged that the articles, all together, "were calculated and intended to falsely represent to the public the nature of the proceedings had, and to compel a different result on the hearing of a new trial." This was immediately followed by specifications of allegedly false statements, omissions and overemphasis. Then, that "these articles,

in their entirety and standing alone and together, were wilfully and knowingly written, published and circulated by the persons aforesaid for the purpose of presenting to the reading public *by means of false statements, omissions, distortions and overemphasis*, that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen, unable because of his service to his country, to defend himself, of his rights in and to valuable property, and that counsel for plaintiffs and the court aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful." (R. 26.) (Our emphasis.)

Obviously, the false statements, omissions, distortions and overemphasis so referred to were those which had been specified immediately before in R. 24-25. (Copied in full *ante*, pp. 16-18.) The part of the complaint above quoted is immediately followed by the concluding paragraph of the complaint, this single sentence:

"Affiant would further show the court that the purpose of this representation to the citizenry of the city of Corpus Christi and County of Nueces was intended and calculated to reflect upon the integrity of the court, and bring it into disrepute *and prejudice and influence the court in its ruling on the aforesaid motion for new trial*, and that the said publications

and circulations were made for the purpose and with the intent of scandalizing the court, and intended to influence or overawe its deliberations in said pending cause, *and were made at a time and under circumstances calculated to affect the force of justice in said proceedings*, and were so calculated to do and were intended for that purpose." (Then follows immediately the *nisi* judgment of guilt. R. 26. Our italics.)

The Court of Criminal Appeals has lifted from the last quoted paragraph the italicized parts, and, by recombining them with others, similarly extracted from other paragraphs, has reconstructed what it designates a single charge, selected, so it says, from "various reasons whereby it was claimed that the articles mentioned constituted contempt of court." The so-called single charge discussed by the court is thus stated: "that the articles when taken together and considered as a whole 'were calculated and intended to falsely present to the public the nature of the proceedings had and to compel a different result on the hearing of the motion for a new trial' and to 'prejudice and influence the court in its ruling on the aforesaid motion for a new trial * * * and were made at a time and under circumstances calculated to affect the force of justice in said proceedings * * *.'" (The omissions are the Court's not ours.) (R. 424.)

The county judge interpreted the complaint, in accord with our understanding of it as above stated, as charging contempt of court "by means of," or, as he expressed it, "by reason of" false reports. He found that the reports and editorial, "by reason of"

inaccuracies, omissions, emphasis and inclusion of foreign matters, were "of a nature calculated to" accomplish the alleged wrong as specified by him. (This basic finding (R. 81) is quoted in full in the Statement, *ante*, p. 19.)

The Court of Criminal Appeals declined to consider the defense that the newspaper articles were substantially true. We recognize that truth is not a complete defense invariably. For example, no one would be permitted to apprise a jury by extra-legal means of prejudicial facts not in evidence. But this case does not fall within any such exception. Here, it was charged that the offense was committed "by means of" a false report to the public of the facts of the trial.

## Charges of False Reporting Are Answered by the Record

As briefly as can be done we answer from the record the specific charges of false reporting.

(a) The first is *that it was falsely stated that Mayes was an ex-insurance man whereas insurance was his principal business.* (R. 24-25.) It is hard to see how or why it was wrong to refer to Mayes incidentally in the news accounts as "an ex-insurance man"; instead of saying that insurance was his principal business. He did testify that in addition to the Playboy Cafe he owned an insurance business. (R. 228.) What had happened to it when he joined the army or that it was his "principal business" is not

shown by the record. The charge, we submit, is frivolous.

(b) The next charge is that the articles "*failed to state the terms of the contract declared on by the plaintiffs.*" (R. 25.) Obviously, this referred to the provision of the contract which the court construed as conditioning the option on payment of the first month's rent of $275 in advance. The applicable provisions of the contract were repeatedly referred to in the news accounts. For example, in the Caller-Times of May 27 (Exhibit C-T-27): "The option clause gave Mayes the right to continue at the location for another year at a monthly rental of $275, but Burchard said he had never seen a copy of the lease and was unaware of its provisions for a rental increase." (R. 365.) In substance, the statement was repeated in The Caller of May 28. (R. 370.)

(c) Next is a charge of omission, namely, that *the papers failed to state that the second check tendered by Mayes' agent was tendered seven days late and was postdated 30 days, and for that reason was not legal tender.* (R. 25.) No issue of technical legal tender was involved. The evidence showed without dispute that the so-called postdating of the check was due to inadvertence. (R. 263-264.) It showed, moreover, that the check was not rejected on that ground. Besides, Burchard had testified that on March 19 (before he forwarded the check of March 21) and when for the first time he saw a copy of the lease, he offered to complement the $250 check by paying the additional $25. (R. 294.) The record shows without dispute that if the March 21 check had been so dated

plaintiff would not have accepted the money at that time (R. 315) and that his failure to pay the required amount before that date, in Judge Browning's view, defeated his rights. (R. 210.) Considering the equities, neither the tardiness nor the postdating of the check defeated Mayes' rights.

(d) The meaning of the next charge, that said articles *"omitted to state that the arrangements under which the premises were operated had been in existence for some months before the defendant Mayes was inducted into the Army"* (R. 25), is obscure. If it had reference to "the arrangements" between Mayes and his agent Burchard, the answer is that the Times of Saturday, May 26, 1945, reported: "While Mayes did not go into the Army until a few months ago, Burchard testified he held power of attorney to act for the Army private since May 22, 1944." (R. 361.)

(e) A number of answers are available to the next charge, that *"said articles failed to state the legal grounds upon which plaintiffs' motion for an instructed verdict was urged and granted, but referred to it in a derogatory manner, in quotations, as a 'one-page motion'."* (R. 25.) There is nothing in the record to show that the court had explained, so that a layman could understand it, "the legal grounds" on which his instructions to the jury were based. The record does show that he failed to make this plain to the jury. Of course, the extraordinary, if not unique, dissension between judge and jury was the most striking circumstance of the evening, and

could have accounted for the omission of less dramatic facts. As for the second half of the charge, that the motion was referred to in a derogatory manner as a "one-page motion," this was a direct quotation of remarks of counsel, "Do I understand that your Honor is going to arbitrarily grant Mr. Tarlton's one-page motion, without argument?" (R. 213.) It is not shown that the court reproved, or otherwise took notice of the statement by counsel.

(f) Considering the fact that petitioners were charged with a criminal offense, the part of the complaint charging that "*the articles omitted much material evidence that would have enabled the public generally to form a fair estimate of the nature of the controversy*" (R. 25), is too general to require answer. The mental reactions of the jury, as manifested by their unmistakable conduct, furnished convincing, if not conclusive, evidence of the view that would have been taken by the public generally if they could have had the fullest possible information about the case and the trial. The petitioners were certainly under no duty to present the case in a different light from that which would have been reflected by a complete disclosure of all that took place at the trial.

(g) The charge next in order, that "*the articles failed and omitted to name the principal plaintiffs, who are highly respected business and professional men of Corpus Christi, Texas*" (R. 25), is without merit. Dr. Heaney and the Messrs. Flato, to whom this referred, were nominal plaintiffs, as part owners of the building, but with no real interest in the

controversy (R. 310, 311): It was not shown that they knew anything about the way that Mayes was being treated or were in any way to blame for it. To the layman it was apparent that the contest was between Mason and Mayes.

(h) Juxtaposed to the charge last above quoted was this: *That the articles were published for the purpose of presenting to the reading public "by means of false statements, omissions, distortions and over-emphasis, that in its essence the action was one brought by corrupt and unlawful parties to unlawfully, improperly and unjustly deprive a patriotic citizen of his rights in and to valuable property, and that counsel for plaintiffs and the court aided and abetted the corrupt parties aforesaid in the furtherance and accomplishment of this purpose, and that the citizenry generally of Corpus Christi and Nueces County did as a result of the publication and circulation of these articles believe that the actions of the plaintiffs, their counsel and the court were in fact corrupt, improper and unlawful."* (R. 26.) The facts did show that Mayes was badly treated. If the press accounts left the impression that this was by corrupt persons, it was because they substantially tracked the testimony, much of which was hearsay, obtruded into the case by the judge himself.

For example: "Mr. Tarlton: We object to that as hearsay. The Court: I am sure the jury would like to know how do they know these things." (R. 324.) Again: Witness: "He told me then—", the hearsay objection being repeated, the court ruled: "I am asking the questions. What else, who else?" (R. 325.)

Again: "Mr. Tarlton: We object to all of that as hearsay. A. The Judge just asked me to tell it. Mr. Lewright: The Judge asked these questions. The Court: I am asking the questions. What else. Who else? Mr. Lewright: Wait a minute. The Court: Just a minute. I am asking the questions. Mr. Lewright: I want him to finish that conversation. The Court: Oh, all right. A. Mr. Cott stated to me, 'You are smart enough to know what you are up against, and they will do as they did at San Antonio.' He says, 'You know what happened up there. That man was shot and nobody arrested for it and accused of killing him. That is what occurred, and when Doc Mason and his partner—'" (R. 325-326.)

Both counsel having concluded their examination of Burchard, the court took him over: "The Court: Just a minute, Mr. Burchard. This Court would like to know a little more about why you didn't go before the grand jury. A. I went to the foreman of the grand jury, Mr. DeWitt McGee and told him that I had a lot of information that I would like to present to the grand jury as to the gambling interests of Doc Mason, that I have in my possession, a list of 100 places in which Doc Mason is conducting and elsewhere gambling, slot machines, poker games, dice games and policy rackets where he conducts a numbers racket, and I told Mr. McGee, the foreman of the grand jury, that I would like to know if he would be willing to go with me before Judge Westervelt and frankly tell the Judge our story and ask permission of the Judge to have one or two investigators to get out and get the information relative to these places and present it to the grand jury. The Court: What

did Mr. McGee state? A. He said he would go with me before Judge Westervelt. The Court: Did you go before Judge Westervelt? A. No, I didn't. The Court: Why?" (R. 331-332.) Again, overruling an objection that the cross-examination as to collateral matters was inadmissible even for impeachment, the court said: "I think the jury is entitled to all the facts, and I feel that I brought some of these points out and I think that the plaintiffs have the right to go in and cross-examine the witness." (R. 333.) Finally, he ruled that all of the testimony about gambling was hearsay, and instructed the jury to disregard it. (R. 334.) It was patently hearsay when at the inception the objection on that ground was overruled. This belated interdiction imposed no ban upon the press; and the court proceedings, excursive matter included, were reported as they occurred (R. 365-366; 368-369).

We add that the record is simply devoid of support for the charge that the articles were published for the purpose of inducing the belief that the actions "of the plaintiffs, their counsel and the Court were in fact corrupt, improper and unlawful." Nor does the record furnish any support for the charge that the published articles had any such effect. As petitioners stated at the end of the contempt hearing, they at no time imputed bad motives to the judge.

The treatment of Mayes is indefensible. Both he and Burchard had informed Jackson, and after Mayes had gone into the army, Burchard had informed Mason, that they desired to remain in the building. Mayes so stated to Jackson in December, 1944 (R. 253, 254); and he closed the cafe during

Christmas week while he spent $400 in renovating. (R. 255-256.) Burchard first informed Jackson of their desire to keep the building and later so advised Mason, who was the real party at interest. (R. 262, 352.) We take up the next charge:

(i) *"That the articles needlessly repeated and emphasized the fact that the defendant Mayes was in the armed service."* (R. 25).

This was perhaps the most newsworthy single fact in the case. Beyond question, advantage was taken of his absence. This would have had a different significance if the absence had been voluntary, but it was not. It was potentially enforced by the power of the National Government.

The sufficiency of the action taken in exercising the option; the effect of the failure to pay in advance the full amount of the rent; none of the important facts in the case could be properly appraised without taking into account Mayes' absence in the Army.

The court was wholly unwarranted in summarily punishing the petitioners for not playing it down.

(j) The next charge: *"That the articles repeated, reiterated and over-emphasized the court's insistence that the verdict be returned in accordance with its instructions."* (R. 25.)

It is hard to see how this could have been contemptuous, even if it had been played up as charged. The complete answer is that the parties have stipulated that the accounts of what took place in court relating to that occurrence, as presented in the Caller-Times of Sunday, May 27, and in the Caller

of Monday, May 28, are "substantially correct." (R. 217.) The stipulation was approved by Judge Browning (R. 225).

(k) *"That the articles needlessly repeated, reiterated and over-emphasized the fact that no argument was heard on plaintiff's motion, and gave no prominence to the fact that defendant's motion for an instructed verdict was argued by defendant's counsel for ninety minutes, and that ruling on that motion was held in abeyance until all the evidence was in."* (R. 25.)

The above charges are not supported by the record. In the Caller-Times of Sunday, May 27th, it was stated that in support of defendant's motion for directed verdict, "The defense counsel argued for close to 90 minutes—" (R. 369). Again, in the Caller of May 28th, it was stated "At the close of the testimony, Saturday night, Dudley Tarlton presented a motion for a directed verdict for the plaintiff. Lewright had presented a similar motion for the defendant earlier in the day on which argument continued for an hour and a half." (R. 371.)

Here was a case of which the County Court had final jurisdiction. It *was* unusual to refuse to hear defendant's argument against the plaintiff's motion for directed verdict. Full argument had been permitted on the earlier motion, but the issues were different. The law questions arising on the two motions were not identical; nor were the facts.

Why should the County Judge (layman or lawyer) refuse to hear argument before taking such a case from the jury? To be sure, the Judge has a

discretion in such matters. But his great power in a case where he is the final arbiter should prompt him to exert equally great care to avoid abusing it. We respectfully submit that to any fair-minded layman it would appear that in the circumstances the Judge should not have acted summarily on the motion, *refusing to hear* defendant's answer to it.

Finally, as we have pointed out in answer to a related charge, counsel, in open court, characterized the court's action in granting the motion without argument as *arbitrary*. This brought no reprimand from the court. The court had no license to punish summarily the news men for not playing it down.

(l) *"That the articles failed to state that the jury had no right to conclude what the law might be upon the proof of any given set of facts, but that they were duty bound to receive the law from the court."* (R. 25.) The record refutes the charge. The Caller of Monday, May 28, carried the statement that Mr. Lewright, counsel for defendant, told the jury on Sunday morning, that "*under the law*" Judge Browning had the right to compel them to sign the verdict. (R. 373.) Again, in the Times of Tuesday, May 29, the newswriter stated that the Judge "exercised a *legal right* to order the jury to find a verdict for the plaintiff." (R. 377.)

(m) In what we have said we have answered the next charge: *"That the articles failed and omitted to state that the court was under no duty to hear arguments or the citation of authorities from either party."* (R. 25).

(n) This brings us to the only remaining charge: *"That remarks of counsel for the defendants were set forth verbatim and given prominence, while remarks of counsel for the plaintiffs were omitted or given no prominence."* (R. 25).

Presumably, the reference is to the "remarks" made following the court's announcement that he would instruct the verdict for the plaintiff. This, naturally, evoked protest from counsel for defendant, and hardly called for remarks by counsel for plaintiff. In the ensuing proceedings it appears that compliance of the jury required the help of counsel for defendant, who, on Sunday morning, to avoid having the jury kept in custody until Monday, or later, appealed to the jury to obey the court's instructions. His remarks were reported in full, or substantially so, in the Monday Caller. They were effective in accomplishing what the Judge had failed to accomplish. The occasion for them, their content, and the results produced by them combined to make them newsworthy.

Finally, the stipulation says that the accounts as published in the Caller-Times of Sunday and the Caller of Monday, including the reports of the "speeches and statements addressed to the jury and to the court by Walter M. Lewright, counsel for defendants, and B. D. Tarlton, counsel for the plaintiffs, and statements and remarks made by Joe D. Browning, County Judge, to the members of the jury and counsel," *"are substantially correct."* (R. 217.)

As Judge Beauchamp's opinion suggests (R. 443-444) Judge Browning's notion that petitioners had published a misleading report of the trial of the de-

tainer suit was induced by his erroneous conception of the controlling question of law in that case. He thought that, perforce a forfeiture provision for non-payment of monthly rental in advance, such failure to make timely payment put an end to the lease. He erroneously gave to such forfeiture clause the effect of a provision marking the duration of the estate granted (R. 210). Besides, there had been no demand for payment of rent; and in the absence of refusal to pay, after demand, forfeiture for non-payment of rent would not lie. *Gray v. Vogelsang* (Tex. Civ. App.), 236 S. W. 122 (1921).

Under Judge Browning's view of the law, the dispute could have been ended in a brief pre-trial conference, or the case could have been tried in less than an hour instead of consuming two days. This, for the reason that it was undisputed that the full amount of the monthly rental was not paid on the day when due. But it was undisputed that the default was caused by a mistake, and contributed to by the misleading conduct of others. In the circumstances equity would allow no such forfeiture. *Benavides v. Hunt*, 79 Texas 383; *Randolph v. Mitchell* (Tex. Civ. App.), 51 S. W. 297; *Creamery Dairy Co. v. Electric Park Co.* (Tex. Civ. App.), 138 S. W. 1106; *Mettier v. Osborn*, 146 Mass. 399; *Gordon v. Richardson*, 185 Mass. 492; *Cole v. Johnson*, 120 Iowa 667. Besides, under Texas law, the covenant for rent was not effective to limit the term or duration of the estate. *Waggoner Estate v. Sigler Oil Co.*, 118 Texas 509.

This shows that Judge Beauchamp (R. 443-444) was right in concluding, also, that the conviction of

contempt was not sustained since it was predicated upon a charge that the newspaper articles "by reason of inaccuracies, * * * were of a nature calculated * * * to coerce and compel a judgment contrary to the law and the evidence" (R. 81).

Freedom of the press, as restricted by the decision below, means that a news reporter incurs the risk of summary punishment if he fails to interpret and report the facts of the trial in accord with the notions of the trial judge concerning the controlling questions of law. Under that abridged liberty, if the reporter, acting in good faith, interprets the facts in a way that fails to vindicate the trial judge's conclusions of law, he may be laid by the heels for contempt. This would not make allowance for reasonable differences of opinion in appraising the facts. It would fall far short of allowing "the widest range compatible with the essential requirement of the fair and orderly administration of justice" (*Pennekamp v. Florida*, 66 S. Ct. at 1037; 90 L. E. (Adv. Op.) at 1009), or "the broadest scope that could be countenanced in an orderly society." *Bridges v. California*, 314 U. S. at 265.

**Point 4**

**The element of the judgment which imposes punishment for scandalizing the court vitiates the entire judgment.**

In the judgment *nisi* petitioners were found guilty of contempt on the ground, *inter alia*, that "said publications and circulations were made for the purpose and with the intent of scandalizing the court * * *

(R. 26). For this they were sentenced to serve three days in the county jail "unless they purge themselves thereof" (R. 26). In the final judgment of the county court petitioners were adjudged guilty of contempt because "said reports and editorial, considered in their entirety, by reason of the inaccuracies, * * * were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, to affect the course of justice and the rights of litigants in Cause No. 5095 [the forcible detainer suit] * * *" (R. 81). Motion for new trial in the detainer suit was overruled on June 6, 1945 (R. 209). The judgment *nisi* in the contempt proceedings was rendered on June 4, 1945 (R. 19). The final judgment in the contempt proceeding was rendered in August, 1945 (R. 83), after the judgment in the detainer suit had become irretrievably final at a former term of court (R. 81). At the end of the contempt hearing, and before judgment was pronounced, the county judge inquired whether the petitioners desired to purge themselves of contempt. (See stipulation, *post*, p. 60.) In response to such inquiry the McCracken statement was made to the court, which he introduced by explaining that he did not know what was meant by purging in a case of that kind. The entire statement is in Appendix C, *post*, p. 58.

If Judge Browning was not satisfied with the McCracken statement (adopted by the other petitioners) it is obvious that what he wanted was retraction and apology. The judge's willingness to accept at that date such a purging reveals his interest in an expiation of the so-called scandalizing offense,

and renders apposite this question by Mr. Justice Holmes, taken from his dissenting opinion in *Craig v. Hecht:* "how can it be pretended that the charge obstructed the administration of justice when the judge seemingly was willing to condone it if the petitioner would retract?" (263 U. S., at 281.) This Court held unanimously in the *Bridges* case that scandalizing the court is not, *per se*, contempt of court or summarily punishable as such. 314 U. S. at 270; 287.

There were not two separate penalties, one for supposedly obstructing justice and the other for scandalizing the court. There was a single sentence of imprisonment for scandalizing the court and attempting to obstruct justice. Even if, contrary to fact, it be assumed that the record supports the latter, the entire judgment is vitiated by the penalty for scandalizing the court. *Thomas v. Collins*, 323 U. S. 516, 529.

## Conclusion

The *Toledo Newspaper* criticisms, winding up "Impeach Killits," as weighed by Justices Holmes and Brandeis, fell short of "anything that would have affected a mind of reasonable fortitude." 247 U. S. at 425; quoted in *Bridges* case, 314 U. S. at 278. It is submitted that there was no clear or real danger that a judge who measured up to the same external standard would be overawed by the newspaper articles complained of here. It is impossible to think of an effective intimidation of the judge by these articles

without having in mind a judge who fails to satisfy respectable judicial standards, in point of character.

---

Petitioners respectfully pray that the judgment of the Court of Criminal Appeals be reversed with directions that the petitioners be discharged from custody.

Respectfully submitted,

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## APPENDIX A

### "The Crow's Nest"

**"Judge and Jury"**

"The week-end incident in county court lends force to a frequently made argument that the judge should be a lawyer. A layman occupying its bench is bound to end up in hot water sooner or later when he is sitting on a case where fine points of law are argued. Probably the basic fault lies with the Texas constitution and statutes which vest judiciary authority in a county judge but which do not require the occupant of the office to be an attorney. The office is filled, not only in Nueces, but in many other Texas counties, by a layman.

The incident around which the present controversy rages involves such a case. Bush M. Jackson, agent, employed a technicality in seeking to break the lease of Pvt. Joe L. Mayes of the United States Army on a ground floor location in the old Elks Club building where Mayes operated a cafe. Mayes contends that his lease is still in force.

The case was heard by a jury before County Judge Joe D. Browning. Expert counsel represented the principals. About the only knowledge that Browning, a layman, has with court procedure has been gained during his occupancy of the office. Obviously, he has an even more sketchy knowledge of the points of law which opposing attorneys were arguing.

Yet he instructed the jury to return a verdict for the plaintiff. The jury twice ignored his orders and decided for the defendant. Only when the defend-

ant's counsel advised its members that they were obliged to follow the judge's instruction did they comply, and then with a notation that they were violating their conscience.

**One-Sided Opinion**

*Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on, especially when a man in the service of his country seems to be getting a raw deal.*

But that's not the point. A better objection to the judge's decision deals with a more fundamental issue.

When the testimony was in, the defense counsel offered a motion for an instructed verdict for his client. He was required, as is the custom, to give his authority, and arguments against were made by the plaintiff's attorney. The judge overruled the motion after hearing both sides.

*Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a chance to argue against it.*

*That was the travesty on justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's no wonder that the jury balked and public opinion is outraged.*

**Knowledge Essential**

*The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances a competent layman would be better qialified, but the county judge's office is an exception. He should be a competent attorney as well as a competent businessman.*

*It's the tragedy in a case of this sort that the court where the controversial decision was handed down is the court of last resort. It's too bad that appeal can't be made to a district court and heard by a judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly.*

The Lookout, himself a layman, doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority. *There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated.*

He only knows that respect for the court's ability to mete out justice has been badly shaken, a result that can make for a dangerous condition. Qualified jurists must occupy our benches. Men of conscience must be encouraged to sit on our juries.

This column is written for the Caller by Bob McCracken. Opinions expressed are those of the writer and do not necessarily reflect the policy of this news

paper." (R. 378. Italics indicate the part copied in the complaint, R. 14-15, and in the opinion of the Court of Criminal Appeals, R. 421-422.)

## APPENDIX B

[The part of the opinion of the Court of Criminal Appeals which interprets and appraises the above editorial, Appendix A.]

"When the several publications in the instant case are considered together and in their chronological order of appearance, there is no escape from the conclusion that it was the purpose and intent of the publishers thereof to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint, Judge Browning was wrong and they took it upon themselves to make him change his decision. To accomplish that end, Judge Browning's action in instructing the jury, without hearing argument on the motion, was editorially denounced as a 'travesty on justice' and 'high handed'; as properly bringing 'public opinion down on his head'; as outraging 'public opinion'; as a 'tragedy' that the case could not be appealed to another judge who was 'able to interpret and weigh motions and arguments of opposing counsel and to make his decisions accordingly'; and as a repudiation of the 'first rule of justice,' as a consequence of which 'there is no way of knowing whether justice was done.'

"Following, and in connection with, the editorials,

news items were published showing that a certain group of citizens had passed a resolution denouncing the decision as a 'gross miscarriage of justice.' Other news items followed, showing that three different groups of citizens were petitioning or circulating petitions calling on Judge Browning to grant Mayes a new trial in the case and to permit the case to be re-tried by another judge'—all to show that by reason of the attitude of the publishers toward Judge Browning's ruling and decision, as reflected in the editorials, public opinion had become aroused and was demanding that a new trial be granted in the case because, in agreement with the viewpoint of the publishers, Judge Browning's ruling was wrong.' (R. 436.)

## APPENDIX C

[Statement made by McCracken (concurred in by the other petitioners) at the end of the contempt hearing, in response to the question by Judge Browning as to whether they desired to purge themselves. See copy of stipulation, following this Appendix; original on file with clerk of this Court.]

"I can speak only for myself. Without knowing the meaning of purging a contempt, especially in a case of this kind, and not being guilty of any contempt as I concede [conceive], I can only say this:

I think that the impression created upon the mind of the public by all that was said in our papers about the Jackson-Mayes trial was the same impression

that would have been created upon the minds of an average intelligent layman who sat through the trial. It was the same impression that would have been created if the entire proceedings could have been published. In saying this, I do not impute unworthy motives to anyone; I do not undertake to judge motives.

Moreover, I do not profess to know or presume to advise how the case should have been finally decided. It was my hope that the Crow's Nest published in the papers would quicken the conscience of the judge. I wanted him to search his conscience. It was my hope that what I said would make him more careful in discharging his duty. I think my column was calculated to have that effect upon a conscientious judge.

As I saw it then, and as I see it now, the statements in the papers could not have the effect of overthrowing the will or undermining the conscience of the judge. They could have no such effect upon any judge worthy of the name. I assumed that the judge would understand that he, and he alone, would have to decide the law as he understood it.

I would not bring our courts into disrepute. Indeed, in the long run, their standing before the bar of public opinion is determined by the courts—and by them alone—but I would do what I can to help them always to perform their high and solemn duties.

If, in this instance, I have gone about it in a way that has needlessly wounded sensibilities, I am sorry for that, but I do not concede [conceive] that anything that I have done gives your honor license to punish me for it." (R. 425.)

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 241

CONWAY C. CRAIG, BOB MCCRACKEN AND TOM MULVANY, *Petitioners*,

vs.

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

## STIPULATION

The parties stipulate that the statement of petitioner McCracken (R. 425) was made at the end of the contempt hearing in response to Judge Browning's inquiry from the bench at that time, as follows: "Do the respondents care to purge themselves?"

Dated this 6th day of November, 1945.

IRELAND GRAVES,
*Counsel for Petitioners;*

JERRY D'UNGER,
*Counsel for Respondent.*

ATTORNEY GENERAL OF TEXAS
By Harris Tolar, First Assistant,
*Counsel for Respondent*

(Original Stipulation on file with Clerk of this Court.)

FILE COPY

NO. 241

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

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CONWAY C. CRAIG, BOB MCCRACKEN AND TOM MULVANEY,

Petitioners

v.

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

Respondent

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## BRIEF FOR RESPONDENT

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Nixon Building
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Attorney General of Texas.
Attorney for Respondent.

FIRM FOUNDATION — AUSTIN

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Petitioners

v.

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

Respondent

---

## BRIEF FOR RESPONDENT

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Petitioners have not filed any brief in this case except their brief in support of the petition for a writ of certiorari. This brief for respondent is directed to that brief.

## OPINION OF THE COURT BELOW

The opinion of the Court of Criminal Appeals is reported under the style of Ex parte Craig, Ex parte McCracken, Ex parte Tom Mulvaney. Vol. 193 S.

W. (2) 178, and is copied in the record from pages 418 to 449.

## NATURE OF THE CASE

The petitioners, who are the publisher, managing editor, and news reporter of newspapers of general circulation in the City of Corpus Christi, and in Nueces County, Texas, were accused by complaint, (R. pp. 12 to 19) duly filed in the County Court of Nueces County, Texas, of being in contempt of that Court for publishing in May and June of 1945 news accounts of, and an editorial commenting upon, the trial of a civil case known as *B. M. Jackson, et al.* v. *Joe L. Mayes, et al.* The news accounts and editorials complained of were published during the trial of the case on its merits before a jury, and while the Court was considering a motion for a new trial (R. p. 18) after he had instructed the jury to return a verdict for the plaintiff (R. p. 207). On June 4, 1945, while the Court had under consideration the motion for a new trial, the Judge of said Court, acting upon a complaint filed on that day, entered a judgment nisi adjudging the petitioners guilty of contempt and directing that they be summoned to appear on June 8, 1945, and show cause why the judgment nisi should not be made final (R. p. 26). Under the judgment of contempt the petitioners were sentenced to a term of three days in jail. On August 3, 1945, the Court entered final judgment ordering that the petitioners be so punished for their contemptuous news accounts and editorial.

The motion for new trial in the civil case, which was a suit for forcible detainer, was denied and the judgment of said suit became final on June 6, 1945 (R. p. 209). When the final judgment was entered in the contempt proceedings against petitioners, the Court found that "the said reports and editorial, *considered in their entirety*, by reason of inaccuracies contained therein, material matters omitted therefrom, emphasis on matters of evidence adduced at the trial of Cause No. 3624, and the inclusion in said articles and editorial of matters foreign to the record in said cause, were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, *to affect the course of justice and the rights of litigants in Cause No.* 5095, *to coerce and compel a judgment contrary to the law and the evidence in said Cause No.* 5095 *and to block the administration of justice, and that the said news reports and editorial were intended so to do.*" (R. p. 84) (No. 5095 is the number of the case in the Justice Court and No. 3624 is the number of the case in the County Court).

Petitioners applied to the Court of Criminal Appeals for a writ of habeas corpus and that Court after a hearing adjudged the petitioners guilty of contempt (R. 449). The majority of the Court held that the petitioners were not protected by the guaranties of freedom of the press (R. 413-448). There was a dissenting opinion which held that the publications were not contemptuous (440-449).

The presiding Judge of the Court of Criminal Ap-

peals granted a stay of execution pending disposition by this court of this proceeding (R. 458).

## SUMMARY OF THE ARGUMENT

### COUNTER-POINT 1

**The Court of Criminal Appeals of Texas, in the instant case, has applied the rule of "clear and present danger" in accordance with the principle announced in Bridges v. State of California, 314 U. S. 252, 62 S. C. 190.**

## AUTHORITIES

Bridges v. State of California, 314 U. S. 252.
Craig v. Hecht, 263 U. S. 255-278.
Patterson v. Colorado, 205 U. S. 454.
Pennekamp v. State of Florida, 66 S. Ct. 1029.
6 R. C. L., p. 508, Sec. 20.
Schenck v. U. S., 249 U. S. 47.
Toledo Newspaper Company v. U. S., 247 U. S. 402.

### COUNTER-POINT II

**The finding of the Court of Criminal Appeals of Texas that the publications complained of constituted a clear and present danger to the impartial administration of justice is supported by the record in this case, is warranted under**

**the circumstances, and is within the field of that court's judgment.**

## AUTHORITIES

Bridges v. State of California, 314 U. S. 252.
Pennekamp v. State of Florida, 66 S. Ct. 1029.
Texas Constitution, Art. 5, Sec. 15.

## COUNTER-POINT III

**The truthfulness of publications commenting on a pending trial constitute no defense, when the publications present a clear and present danger to the impartial administration of justice.**

## AUTHORITIES

Beacon Lumber Company v. Brown, 14 S. W. (2) 1022.

Burt v. Smith, 203 U. S. 129.

French v. Taylor, 199 U. S. 274.

Luckenbach v. U. S., 272 U. S. 533.

Patterson v. Colorado, 205 U. S. 454.

Rawlins v. Georgia, 201 U. S. 638.

Vernon's Texas Civil Statutes, 1925, Art. 3992.

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## COUNTER-POINT IV

**The judgment of the Court of Criminal Appeals of Texas, rendered herein, contains no elements affecting its validity, force or effect.**

## AUTHORITIES

Patterson v. Colorado, 205 U. S. 454.
9 Tex. Jur., p. 623, Sec. 37.
Thomas v. Collins, 328 U. S. 516.
Vernon's Texas Civil Statutes, 1925, Art. 5154A, Sec. 5.

## COUNTER POINT ONE

The Court of Criminal Appeals of Texas, in the instant case, applied the rule of "clear and present danger" in accordance with the principle announced in *Bridges* v. *State of California*, 314 U. S. 252, 62 S. Ct. 190, and concluded that:

(a) the publications were made and published with the purpose and intent on the part of the publishers to force and compel a trial judge to change his decision, set aside the judgment theretofore rendered and to grant a new trial in a civil case then pending before him; (b) the likelihood that the publications, when considered together, would cause the Judge to accede to such demand was exceedingly high, and presented a clear and present danger to the due administration of justice in the case; and

(c) having followed the current rule of law, the decision of the Court of Criminal Appeals of Texas should be overturned only when and after this Court finds, from an independent examination of the record, that the undisputed facts authorized no such conclusion.

## ARGUMENT

In the first point raised by petitioner, it is contended that the Court of Criminal Appeals of Texas, under the guise of applying the "clear and present danger" rule, in reality applied the "reasonable tendency" or "reasonably calculated" rule, recognized by the courts of last resort of many states and applied by them prior to the decision in the Bridges case.

Petitioner's conclusion is evidently based on the fact that the court below in several instances cited authorities which used the words "tendency" or "calculated to," or "tending to." It is pointed out that the Court of Criminal Appeals stated that "but when newspaper publications are made during the pending of a case in court, and reach the point of interfering with the due administration of justice in the courts of this state, they cease to be protected by these constitutional guaranties," (R. 428) and cited in support of this view the case of *Craig* v. *Hecht*, 263 U. S. 255-278, in which Chief Justice Taft said:

> "It is of primary importance that the right freely to comment on and criticize the action,

opinions, and judgment of courts and judges should be preserved inviolate; but it is also essential that courts and judges should not be impeded in the conduct of judicial business by publications having the direct tendency and effect of obstructing the enforcement of their orders and judgment or of impairing the justice and impartiality of verdicts.

"If the publication criticizes the judge or court after the matter with which the criticism has to do has been ended, so that the carrying out of the court's judgment cannot be thereby obstructed, the publication is not contempt and cannot be summarily punished by the court; however false, malicious or unjust it may be. The remedy of the judge as an individual is by action or prosecution for libel. If, however, the publication is intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the rendition of an impartial verdict, or in carrying out its orders and judgment, the court may and it is its duty to, protect the administration of justice by punishment of the offender for contempt."

Petitioners also point out that the court below cited the case of *Patterson* v. *Colorado*, 205 U. S. 454, and requote from that opinion only the words, ". . . it would tend to obstruct the administration of justice. . . ." They also quoted Chief Justice Chite's restatement of the conclusions of Judge Killits in *Toledo Newspaper Company* v. *U. S.*, 247 U. S. 402, and invite a comparison of what the Court of Criminal Appeals, per Judge Davidson, has stated were the purposes of the publications in the in-

stant case with the conclusions of Judge Killits.

It must be pointed out that the case of *Patterson* v. *Colorado*, supra, as well as the citation of 6 R. C. L., page 508, Section 20, were cited to support the conclusion of the Court of Criminal Appeals that the truth of a publication is no defense, and not for the purpose of showing that the "reasonable tendency" rule was applicable here. It should be further pointed out that the opinion of the Court of Criminal Appeals does not quote from the opinion written in the case of *Toledo Newspaper Company* v. *U. S.*, supra, and only refers to it in its discussion of the "reasonably calculated" rule. It will be seen at once that petitioners have omitted from their argument a very substantial portion of the *Craig* v. *Hecht* opinion quoted in the opinion of the Court of Criminal Appeals. The portions omitted include the language, ". . . having the direct tendency and effect of obstructing the enforcement of their orders and judgments, or of impairing the justice and impartiality of verdicts."

Certainly, the words "having the direct tendency and effect of obstructing" should not be interpreted as meaning that the publications having a mere "tendency" to obstruct the administration of justice are punishable as being contemptuous. Those words, in their setting, are words of accomplishment, and not of tendencies. Nor may that portion of the Craig opinion quoted by the Court of Criminal Appeals (R. 429),

> "If, however, the publication is intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the rendition of an impartial verdict, or in carrying out its orders and judgment, the court may, and it is its duty to, protect the administration of justice by punishment of the offender for contempt,"

be interpreted to mean that publications having a "reasonable tendency" to obstruct justice are punishable as contempt. The words as used in the context are descriptive of motive and purpose, and have no reference to what effect the publication might "tend" to have.

It is earnestly submitted here that the foregoing authorities cited by the Court of Criminal Appeals furnish no indication that the Court below confined itself to the application of the "reasonable tendency" rule, and that the definitive shadings of petitioner are merely literary distinctions, and do not demonstrate what Mr. Justice Frankfurter, in the case of *Bridges* v. *California*, 314 U. S. 252, 62 S. Ct. 190, (Dissent) terms "differences of Constitutional dimensions."

On the other hand, an analysis of the majority opinion (R. 418) of the Court of Criminal Appeals of Texas clearly demonstrates that the Court in affirming the judgment of contempt rendered by the trial court (R. 79) applied the "clear and present danger" test, in accordance with the principle announced in the case of *Bridges* v. *California*, supra.

where Mr. Justice Black, in commenting on the Schenck case, said:

> "What eventually emerges from the 'clear and present danger' cases is a working principle that the substantive evil should be extremely serious, and a degree of imminence extremely high, before utterances can be punished. These cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights."

It is evident from an analysis of the opinion of the Court of Criminal Appeals that the court had in mind, too, that portion of the opinion written in the case of *Schenck* v. *U. S.*, 249 U. S. 47, 39 S. Ct 247, by Mr. Justice Holmes, where it was said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger, that they will bring about the substantive evil that Congress has a right to prevent. It is a question of proximity and degree,"

as well as the statement of Mr. Justice Reed in the majority opinion written in *Pennekamp* v. *State of Florida*, 66 S. Ct. 1029:

> "What is meant by clear and present danger to a free administration of justice? No definition can give an answer,"

as well as the words of Mr. Justice Frankfurter, in his opinion in the same case (Concurring), " 'clear and present danger' was never used by Mr. Justice Holmes to express a technical legal doctrine, or to convey a formula for adjudicating cases."

From the language in the Bridges case, supra, and kindred cases, it may be safely concluded that each case of this kind is unique, and in each case the particular utterances and the circumstances of their publication must be looked to in determining the seriousness of the substantive evil sought to be prevented, and the degree of imminence. Upon the circumstances existing in every case must depend the rigor of the test applied.

A distinguishing feature in the Pennekamp case lies in the fact that there the publications constitute "only criticism of judicial action already taken" (90 L. Ed. 1010) while here the publications not only criticized judicial action already taken but went further and demanded a certain disposition be made of the case in the matter of granting a new trial as well as the future disposition of the case, by trial before some other judge.

Accordingly, then the Court of Criminal Appeals formulated the following rule for application in the instant case (R. 435):

> "From the Bridges case there emerges then the rule—as we understand it—that state courts are authorized under their inherent or common law power to inflict summary punishment for

> contempt of court upon the publisher of newspaper articles or editorials concerning and relating to a case then pending before the court, only when the language of the publication is used under such circumstances and conditions and are of such a nature as to create a clear and present danger that the due and orderly administration of justice in that case will be obstructed. The likelihood of bringing about that evil must be extremely serious and the degree of imminence extremely high,—the question of that likelihood being one of proximity and degree."

The respondents earnestly insist that in the circumstances in this case this is the correct rule. Of the fact that it was the rule applied here there can be no doubt. The Court of Criminal Appeals in its opinion (R. 435) said:

> "The fact elements distinguish the Bridges case, supra, from the instant case, and render it uncontrolling here, on the facts. However, the rule of clear and present danger, as announced in the Bridges case, supra, is controlling here. It is in the light of that rule, then, that we are ultimately to decide this case."

That there are broad distinctions to be drawn between the facts existing in the Bridges case and in the instant case, is obvious, and these distinctions will be discussed by respondents under Counter Point Two.

It may be that petitioners base their contention that the "reasonable tendency" rule was applied in that portion of the findings of the Court of Criminal Appeals (R. 436) which says:

"It is hard to conceive how the public press could have been more forcibly or substantially used or applied to make, force and compel a judge to change a ruling or decision in a case pending before him than was here done. The publications were not only reasonably calculated to accomplish that purpose but there was also a 'clear and present danger' that they would. . ."

Certainly under the circumstances, there is nothing obscure or ambiguous about this language. It must be conceded that any publications that might constitute a clear and present danger to the administration of impartial justice would of a necessity be "reasonably calculated" to accomplish that result.

The Court of Criminal Appeals (R. 436) stated:

"When the several publications in the instant case are considered together and in their chronological order of appearance, there is no escape from the conclusion that it was the purpose and intent of the publishers thereof to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint, Judge Browning was wrong, and they took it upon themselves to make him change his decision. To accomplish that end, Judge Browing's action in instructing the jury, without hearing argument on the motion, was editorially denounced as a 'travesty on justice' and 'high handed;' as properly bringing 'public opinion down on his head;' as outraging 'public opinion;' as a 'tragedy' that the case could not be appealed to another judge

who was 'able to interpret and weigh motions and arguments of opposing counsel and to make his decisions accordingly;' and as a repudiation of the 'first rule of justice,' as a consequence of which 'there is no way of knowing whether justice was done.'

"Following, and in connection with, the editorials, news items were published showing that a certain group of citizens had passed a resolution denouncing the decision as a 'gross miscarriage of justice.' Other news items followed, showing that three different groups of citizens were petitioning or circulating petions calling on Judge Browning to grant Mayes a new trial in the case, and 'to permit the case to be re-tried by another judge,'—all to show that by reason of the attitude of the publishers toward Judge Browning's ruling and decision, as reflected in the editorials, public opinion had become aroused and was demanding that a new trial be granted in the case, because, in agreement with the viewpoint of the publishers, Judge Browning's ruling was wrong.

"It is hard to conceive how the public press could have been more forcibly or substantially used or applied to make, force, and compel a judge to change a ruling or decision in a case pending before him than was here done. The publications were not only reasonably calculated to accomplish that purpose but there was also a 'clear and present danger' that they would and the likelihood that such result would follow was 'extremely serious' and the degree of 'imminence extremely high.'"

And further (R. 438):

"From what has been said, the conclusion is

> expressed that the publications warranted Judge Browning in holding relators in contempt of court, under the decisions of this Court and of the Supreme court of the United States. The relief prayed for is denied, and relators are remanded to the custody of the arresting officer."

It is submitted that these conclusions and findings of the court below resulted from a proper application of the correct rule, and that they were, as Mr. Justice Frankfurter has said in his concurring opinion in the case of *Pennekamp* v. *State of Florida*, supra, within the wide field in which a state court may exercise its judgment in an estimate of danger in a particular case, and that they should, in accordance with the view expressed by Mr. Justice Reed in the Pennekamp case, supra:

> "while the ultimate power is here to ransack the record for facts on constitutional controversies, we are accustomed to adopt the result of the state court's examination,"

be adopted by this honorable court.

## COUNTER POINT TWO

The finding of the Court of Criminal Appeals of Texas that the publications complained of constitued a clear and present danger to the impartial administration of justice is supported by the record in this case, is warranted under the circumstances, and is within the field of that court's judgment.

## ARGUMENT

Under this point petitioners take issue with the Court of Criminal Appeals of Texas upon the correctness of that court's findings, basing their contention that the court erred principally upon their own interpretation of a single one of the publications, and the alleged fact that the resolutions adopted by certain organizations (R. 161-162) and publicized by petitioners, were not charged to have been approved editorially .

By their interpretation of this single publication (The Crow's Nest, R. 378) they attempt to persuade the court that the purpose of the editorial was to comment upon Art. 5, Sec. 15, of the Texas Constitution, (APP. p. 39) which requires that a county judge have no legal qualifications beyond being "one well informed in the law of the state," and the urging of a change in the Constitution which would require a county judge to be a licensed lawyer.

This position is untenable, for several reasons. Primarily, the Court of Criminal Appeals did not find that this lone editorial constituted a clear and present danger to the impartial administration of justice. The language of that court's opinion (R. 436) is:

> "When the *several publications* in the instant case are considered together and in chronological order of their appearance . . ."

And (R. 436):

> "The *publications* were not only reasonably calculated to accomplish that purpose, but there was also a clear and present danger that they would . . . ." (Emphasis ours)

Next, a reading of the editorial in question leaves no doubt but what it was a direct attack upon Judge Browning's action in instructing a verdict for the plaintiffs without hearing the arguments of counsel. While it is true that in its opening paragraph the editorial (R. 378) says:

> "The week-end incident in the county court lends force to a frequently made argument that the judge should be a lawyer, . . ."

The second paragraph of the editorial, however, makes it clear that the comment on the legal qualifications of county judges is merely incidental to the criticism of Judge Browning's ruling:

> "The *incident around which the present controversy rages* involves such a case . . ." (Emphasis ours) (R. 378)

The editorial then goes on to describe the proceedings leading up to the judge's refusal to hear argument. At this point criticism of the judge's ruling commences, and is continued until the writer admits that he "doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority." (R. 380) Following this admission, the writer then concludes, in part, that "he only knows that respect for the court's ability to mete out justice has been badly shaken, a result that can

make for a dangerous condition. . ." (R. 380)

Petitioners wholly failed to explain how the writer, in spite of his professed ignorance of the law, was able to determine that the plaintiff (R.378-379) "employed a technicality in seeking to break the lease . . ." and (R. 379) "obviously he (Judge Browning) had an even more sketchy knowledge of the points of law." Nor is it made clear, either by the writer or his counsel, that there were any points of law raised in the plaintiff's motion for an instruction that had not been raised by the motion made by defendants for the same purpose, which last motion "the judge overruled . . . after hearing both sides." Neither is it made to appear in what manner the hearing of arguments on plaintiff's motion for an instruction would have altered the court's ruling.

It is submitted that the editorial, even standing by itself, clearly conveys the meaning that the judge's action was erroneous, and was entirely unsatisfactory to the writer and to the entire jurisdiction. This interpretation is supported by the writer of the editorial himself, who, in his statement to the court at the conclusion of the contempt hearing (R. 425) said:

> "It was my hope that the Crow's Nest published in the papers would quicken the conscience of the judge (fol. 587) . . . I wanted him to search his conscience. It was my hope that what I said would make him more careful in discharging his duty. I think my column was calculated to have that effect upon a conscientious judge."

Why, unless the writer was convinced that Judge Browning was indeed knowingly responsible for "a travesty on justice" should he desire that the judge search his conscience, and hope that as a result of the editorial the judge would be more careful in the discharge of his duty?

Surely, this statement clearly demonstrates that the editorial was intended to mean that the judge had been, to say the least, careless in the performance of his duty, and that the judicial conscience was, or at least should be, uneasy.

This editorial, it must be remembered, was written on May 30, 1945, (R. 376-377) two days after counsel for Mayes had announced that a new trial would be sought (R. 375), and on the morning immediately following the actual filing of the motion (R. 389), and before the motion was heard on June 6, 1945. (R. 407)

Further weakening petitioners' position is the fact that the record in this case wholly fails to show that any of the newspapers here involved had ever before editorially advocated amending the Texas Constitution in such a manner as to require county judges to be licensed attorneys, although subsequently the editorial writer states (R. 405) that he had discussed the matter with members of the Nueces County Bar Association.

This is only one of the many points upon which the instant case may be distinguished from the

Bridges case, supra. In the Bridges case, as Mr. Justice Black has pointed out, the Los Angeles Times editorial was written pursuant to a well established and militant editorial policy in labor controversies.

The Court of Criminal Appeals' finding that all of the several publications, considered together, constituted a clear and present danger to the impartial administration of justice is supported by the publications themselves, as well as the record in the case. For instance, petitioners' Exhibit T-29 (R. 377) contains the following language:

> "Browning has undergone severe criticism from disinterested sources because of the manner in which he terminated the trial. He exercised a legal right to order the jury to find a verdict for the plaintiff and the jury, asserting it was bound by its conscience, twice refused before capitulating on Sunday morning, 15 hours after the order was issued.
>
> "Browning was not available today for comment on Lewright's motion for a new trial. At his office it was stated that he would not be in unless probably late this afternoon. He was not at home, either.
>
> "The opinion is growing that he will be compelled by rising public sentiment to grant the motion, and, if the new trial ensues, to leave the ultimate decision to the jury."

Petitioners' Exhibit C-30 (R. 380-381) reads in part as follows:

"The Soldier's and Sailor's Advisory Council, formed in 1940, with the avowed purpose of protecting the rights of men in uniform, is composed of representatives of two American Legion posts, two Veterans of Foreign Wars posts, which claim a combined membership of over 1,000.

"The council's resolution called on Browning to grant Mayes a new trial on the ground that he had committed an error in instructing the jury to find for the plaintiff. The petition asked that Browning, upon granting the new trial, should disqualify himself to further sit as judge in the trial, and should permit the trial to be retried before another judge and jury."

Petitioners' Exhibit C-31 (R. 384) reads in part as follows:

"Three local groups were reported last night to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy Cafe ouster suit.

"One petition is reported being drawn by a parents and teachers group, another by a service mothers' group, and the third is being drawn for independent circulation among parents of men in service.

"The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi Soldier's and Sailor's Advisory Council Tuesday night. This petition called on Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under another judge and jury. Action on the petitions is expected shortly."

That these resolutions and public opinion generally were the direct result of the publicity given the trial of the Jackson-Mayes case may be readily understood after a consideration of the following facts proved during the contempt hearing:

It was shown that the three newspapers here involved are the only bona fide newspapers published in Nueces County, and that the Caller-Times has a circulation estimated by petitioner Mulvany at approximately 50,000. (R. 157) That the newspapers were sold in and around the court house during the course of the Jackson-Mayes trial (R. 151), and that the news stories of the Jackson-Mayes trial were given a prominence comparable with that of the account of the reduction of Tokyo to shambles by B-29 bombers. (R. 88)

The witness Samuel I. Pittman, attorney who prepared the resolution adopted by "Mothers of Men in Service" (R. 161) testified in substance (R. 163-164) that in the preparation of the resolution the witness had had nothing to serve as a guide beyond what he had seen in the papers; that he had obtained his idea for the substance of the resolution from what he had seen in the papers, and that he thought the resolution adopted by the Soldier's and Sailor's Advisory Council of Corpus Christi (State's Exhibit 13, R. 162) was a very good resolution, and that it suited his clients in that respect; and that his clients had reported to him "that they had inquired around here and there, and had been reading in the newspapers, and had got a good deal of this thing . . .

and everybody was pretty well appraised of the facts from the newspapers . . ." (R. 164)

The witness Aubrey Daly, a member of the Soldier's and Sailor's Advisory Council and commander of the American Legion, testified in substance (R. 186) that he had been called by a reporter of the Caller-Times and asked if any action was going to be taken; that his only source of information was hearsay and what he read in the newspapers, and what he had heard coincided pretty accurately or closely with what he had read, and that what he had heard and what he had read could have come from the same source.

The witness Rex Vickery, Chairman of the Soldier's and Sailor's Council, testified in substance (R. 176-177) that the "full investigation" referred to in State's Exhibit 13, was "just what was heard by different ones that talked to us, also what was in the papers; that no one was appointed to make an investigation, but that the resolution had been adopted on what had been heard and seen in the papers"; that the investigation referred to in State's Exhibit 13 "consisted of the discussion had by members of the Council at the meeting and hearsay and what was read in the papers."

The effect of the publications upon public opinion, —and the adoption of these resolutions, are some of the circumstances which affect the question of proximity and degree in this case. Still another such circumstance is the original question as to what

duty the newspapers were under in connection with the reporting of and comment upon the Jackson-Mayes case, in the light of the public's interest in that case. Even if it is to be assumed that newspapers are under the duty to safeguard the integrity of judicial processes and the administration of justice, their actions should be controlled by the degree of interest the public generally has in litigation pending.

It may be conceded that the people of California generally and the Los Angeles Times as well, had a legitimate interest in the trial and sentencing of Shannon and Holmes. The interest of the people sprang from the fact that the Shannon-Holmes case was a criminal proceeding, and the people of California were, through proper agency, party to the action. Moreover, labor controversies directly affect public welfare to a greater or lesser degree. For this latter reason, too, the people of California were directly interested in and likely to be affected by Bridges' telegram to the Secretary of Labor and the strike threat that it contained. But in the Jackson-Mayes case the people of Texas could have no interest. In that cause two parties in a civil action were litigating for possession of premises upon which a beer saloon was located. It is a matter of common notoriety that thousands of such forcible detainer cases are tried in the State of Texas each year, without affecting one whit the welfare of its people. In fact, this very Jackson-Mayes case, when first tried in Justice Court, was deemed to be of so little importance as to be dismissed with a scant 500 words of

print (R. 158) by the very reporter who wrote the thousands of words used in publicizing the trial de novo on appeal. (R. 127)

In the Pennekamp case, supra, as in the Bridges case, it may be conceded that the people of Dade County, Florida, had a well defined interest in the manner in which criminal cases were being handled in their circuit courts. The Miami Herald consequently was justified in criticizing a condition that it deemed baneful to public morals and welfare. In the Jackson-Mayes case, however, there was no reason to believe that the forces of law and order were breaking down. There could have been no threat to public morals, or to life or property, regardless of the outcome of the case. The only people who could have been affected, directly or indirectly, by any judgment, correct or erroneous, that could be entered in the Jackson-Mayes case, were the parties plaintiff and defendant.

There are other important distinctions to be drawn between the instant case and both the Bridges case and the Pennekamp case, supra. In the Jackson-Mayes case Judge Browning had no way of knowing or deducting until apprised by the newspapers that any ruling he might make in the case would subject him to criticism by either newspapers or the public generally, or that any result inimical to the public interest would flow from his action.

Both Judge Scott and Judge Schmidt of the California courts, it was held in the Bridges case, did have, or should have had knowledge of labor condi-

tions, existing before these conditions were publicized, and that in this they should have foreseen certain rulings would subject them to adverse criticism.

In the Pennekamp case, supra, it was said that the cases mentioned were cited merely as examples of the attitude of the courts toward defendants in criminal cases, and that no criticism was leveled at any specific ruling in any cause then pending. In the Jackson-Mayes case, however, we have a direct and powerful attack upon a specific ruling in a matter immediately pending, coupled with an inspired and equally powerful demand for a reversal of that ruling.

Under this state of facts, it is not surprising that the Court of Criminal Appeals of Texas said:

> "It is hard to conceive how the public press could have been more forcibly or substantially used or applied to make, force and compel a judge to change a ruling or decision in a case pending before him than was here done." (R. 436)

The complete lack of interest in the Jackson-Mayes case to any person save the parties thereto, as well as the newspapers' lack of any established policy as to the legal qualifications of county judges, wholly failed to justify the newspapers' treatment of the Jackson-Mayes case, for as Mr. Justice Black has said in the Bridges case, supra:

> "Legal trials are not, like elections, to be won through the use of the meeting hall, the radio and the newspapers."

It is again submitted, as under Counter Point One, that the conclusions and findings of the Court of Criminal Appeals of Texas are correct, that they are within the recognized field in which it may exercise its judgment in an estimate of danger in a particular case, and that they should be adopted by this honorable court.

## COUNTER POINT THREE

The truthfulness of publications commenting on a pending trial constitute no defense, when the publications present a clear and present danger to the impartial administration of justice.

## ARGUMENT

If it be that petitioners contend under Point Three that the news stories of the Jackson-Mayes trial were accurate accounts of the proceedings had during that trial, a glance at the record will reveal the fallacy of their contention.

As stated by the Court of Criminal Appeals in its opinion (R.419):

> "The pivotal issue in the case was whether Mayes's lease of the building had expired because of non-payment of rentals as contracted."

The record shows that the defendant Mayes's agent tendered in payment a check not made pay-

able in the proper amount. When apprised of the fact that the extension of the lease required rental in an increased amount, the agent tendered to plaintiff a check drawn in the correct amount, but post dated 30 days. It was held by Judge Browning that the tender of this post dated check did not constitute payment as provided for in the lease.

Without attempting to list them, it may be said that the news stories purporting to describe the proceedings had in the Jackson-Mayes case made many references to the tender of this check, but no reference was ever made to the fact that the check was post dated.

The petitioner Mulvany on this point testified as follows (R. 130):

> "Q. Well, let me ask you this question, Mr. Mulvany. Did you ever in your writing at any time after the morning of Saturday, the 26th day of May, until you were cited in contempt by this court, make any reference to the fact that that check was post dated?
>
> "A. In the printed stories in the paper?
>
> "Q. Yes.
>
> "A. I don't believe so.
>
> "Q. I will ask you to be a little more definite. Did you, or did you not?
>
> "A. I have forgotten the date of the institu-

tion of the contempt proceedings, and I will say this: I have read through the Sunday and Monday stories of the 27th and 28th of May, and I believe my recollection is that there was no reference to any tender of a post dated check in either of those news stories. Now, the trial ended on the 27th. During the course of the trial I beileve I did not use your term 'a post dated check' in any story that I wrote."

In the Jackson-Mayes case the testimony of the plaintiff's witness, Ben F. Vaughan, on several points was diametrically opposed to evidence adduced by the defendant. Mr. Vaughan's testimony, however, was not published. The petitioner Mulvany, on that score, testified as follows (R. 135):

"Q. Why didn't you use Mr. Vaughan's testimony?

"A. In my judgment it was not particularly newsworthy. I have a great mass of testimony and a great mass of notes. . . . (R. 149)

"Q. But you didn't publish them, did you?

"A. No, I didn't use any of Mr. Vaughan's testimony.

"Q. You didn't think that Mr. Vaughan's denial was newsworthy?

"A. No, I didn't think it was correct.

"Q. You didn't think it was correct?

"A. No.

"Q. What gave you that impression?

"A. Because of some other statements he made under direct examination he retracted under cross examination.

"Q. In other words, you weighed that evidence?

"A. Yes, sir, I did, for its news value only."

On the other hand, if it be that the petitioners base their contention that the publications were true upon their assertion that Judge Browning's instruction to the jury was an error in law, then it must be said that their defense comes as an afterthought.

It must be remembered that petitioner McCracken, in his editorial criticism of Judge Browning (R. 378), criticized not the granting of the motion for an instruction, but the court's refusal to hear argument on the motion. On the instruction itself, the petitioner McCracken had this to say (R. 380):

"The Lookout, himself a layman, doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority."

Petitioners have not attempted to show that the law of the State of Texas requires a judge presiding at a trial to hear arguments on motions, nor, indeed, could this be shown, since the matter of hearing such argument lies entirely within the sound discretion of

the court. However, if it were admitted, which it is not, that petitioners had in fact criticized the instruction given by the court rather than the refusal to hear argument, and that in fact the court's instruction to the jury was erroneous, the Court of Criminal Appeals was nevertheless correct in holding (R. 431) that:

> " - - - The controlling rule to be applied in cases of contempt alleged to have been committed by publications during the pendency of a case in court and relating thereto, is that it is no defense that the publications are true;" and further:
>
> "Perhaps a more conclusive reason why relators were not entitled to show as a defense that Judge Browning's decision was incorrect lies in the fact that no appeal was authorized therefrom, in order that some other court might review his action. If we were to allow that defense here we should review that ruling, in direct opposition to the statute. The issue before us is not whether Judge Browning's ruling was correct or incorrect . . . ."

Of the law applicable, the Court of Criminal Appeals said:

> "It is also the law in this state that in a forcible entry and detainer case the judgment of the county court is final; no appeal is allowed. Art. 3992 R.C.S. (APP. p. 39) The constitutionality of that statute has been affirmed by the Supreme Court of this state. *Beacon Lumber Company* v. *Brown*, 14 SW 2nd 1022. The right of appeal is not a prerequisite of due process, as

guaranteed by our Constitutions. *Luckenbach* v. *U. S.*, 272 U. S. 533, 71 L. ed. 394. It follows, then, that the county court of Nueces County has jurisdiction of the forcible entry and detainer suit, Judge Browning was the judge thereof, whose duty it was to preside in the trial of that case, and to determine the questions of law arising in that controversy."

The Court of Criminal Appeals quotes from the case of *Paterson* v. *Colorado*, 205 U. S. 454, 27 S. Ct. 556, in support of its holding that in cases of this kind the truth is no defense:

> "A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and arguments in open court, and not by outside influence, whether of private or public print."

It is thought, however, that in view of petitioners' argument under Point Three, additional portions of the opinion in the *Patterson* v. *Colorado* case, supra, are applicable, and particularly that portion of the opinion which reads:

> "The foregoing proceedings are set forth in a bill of exceptions, and several errors are alleged. The difficulties with those most pressed is that they raise questions of local law, which are not

open to re-examination here. The requirement in the 14th Amendment of due process of law does not take up the special provisions of the state Constitution and laws into the 14th Amendment for the purpose of the case, and in that way subject a state decision that they have been complied with to revision by this court. *French* v. *Taylor*, 199 U. S. 274, 278, 50 L. ed. 189, 192, 26 Sup. Ct. Rep. 76; *Rawlins* v. *Georgia*, 201 U. S. 638, 639, 50 L. ed. 899, 900, 26 Sup. Ct. Rep. 500; *Burt* v. *Smith*, 203 U. S. 129, 135, 51 L. ed. 121, 27 Sup. Ct. Rep. 37. For this reason, if for no other, the objection that the information was not supported by an affidavit until after it was filed cannot be considered. See, further, *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569. The same is true of the contention that the suits referred to in the article complained of were not pending. Whether a case shall be regarded as pending while it is possible that a petition for rehearing may be filed, or, if in an appellate court, until the remittitur is issued, are questions which the local law can settle as it pleases without interference from the Constitution of the United States."

It is submitted that the contentions urged by petitioners under Point Three do not present a question which will sustain a writ of certiorari from the Supreme Court of the United States to the Court of Criminals Appeals of Texas.

## COUNTER POINT FOUR

The judgment of the Court of Criminal Appeals of Texas, rendered herein, contains no elements affecting its validity, force or effect.

## ARGUMENT

In their argument under Point Four, petitioners appear to take the view that the proceedings had in the Court of Criminal Appeals constituted an appeal from the judgment of contempt rendered by the county court. This, of course, is not case. The proceedings had were original in the Court of Criminal Appeals, and the judgment now under consideration is the original judgment of that court.

There was and could be, as petitioners have stated at page 3 of their petition, no appeal from the judgment of contempt. Petitioners have not urged that this denial of the privilege of appeal has deprived them of due process of law. The question presented for determination in this original proceeding was the legality of the restraint of the petitioners.

In making the determination, the Court of Criminal Appeals considered the propriety of the proceedings employed, the form and the validity of the judgment, as well as the state and Federal Constitutional questions. The propriety of the procedure and the form and validity of the judgment, aside from the Federal question, are to be determined in accordance with local law. *Patterson* v. *Colorado*, 205 U. S. 454.

Of the phases of the case controlled by local law the Court of Criminal Appeals said (R. 424):

> "Various reasons were assigned whereby it was claimed that the articles mentioned constituted contempt of court, none which we discuss save and except that which charges that the

articles when taken together and considered as a whole 'were calculated and intended to falsely present' to the public the nature of the proceedings had and to compel a different result on the hearing of the motion for a new trial' and to 'prejudice and influence the court in its ruling on the aforesaid motion for a new trial . . . and were made at a time and under circumstances calculated to affect the force of justice in said proceedings . . .

"Upon consideration of this complaint and on the same day of its filing, Judge Browning caused to be entered a judgment nisi in which he found that the relators had published the statements alleged and that said publications were continuous and calculated to bring about the evil, as charged, as a consequence of which the relators were adjudged to be in contempt of court, and the punishment of each was fixed at three days' confinement in jail. An order was incorporated therein, commanding relators to appear at a future date to show cause why the judgment nisi should not be made final. The procedure employed was authorized, 9 (fol. 586) Tex. Jur., p. 623, sec. 37. No attack is here made thereon.

"The judgment nisi, after a full hearing, was made final on August 9, 1945."

In any event, the authority cited by petitioners, *Thomas* v. *Collins*, 328 U. S. 516, in support of their Point Four, would have no application here.

In its judgment in the Thomas case the Supreme Court of Texas found that Thomas had violated a restraining order of the Texas District Court by

addressing a general invitation to an audience to join a union, as well as specifically inviting a named individual to do likewise. These invitations, it was held by the Supreme Court of Texas, were violative of sec. 5 of Texas R.C.S., art. 5154A, and for that reason the judgment of contempt rendered by the district court whence the restraining order had issued was affirmed.

The holding of this court in the Thomas case was to the effect that Sec. 5 of Texas R.C.S. Art. 5154A, (App. p. 39) constituted a restraint upon freedom of speech, and that to restrain an individual from issuing a general invitation of the nature here issued by Thomas would be to deprive him of his Constitutional right of freedom of speech.

As to the specific invitation to the individual, the court was silent, and for this reason the holding in the Thomas case should not be considered as voiding a judgment because of any element contained therein.

On the subject of this specific invitation, the court merely said:

> "We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.
>
> "Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as

when he undertakes the collection of funds or securing of subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed. In that context such solicitation would be quite different from the solicitation involved here. It would be free speech plus conduct akin to the activities which were present, and which it was said the State might regulate, in *Schneider* v. *State*, supra, and *Cantwell* v. *Connecticutt*, supra. That however must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly. In this case the separation was not maintained. If what Thomas did, in soliciting Pat O'Sullivan, was subject to such restrictions, as to which we express no opinion, that act was intertwined with the speech and the general invitation in the penalty which was imposed for violating the restraining order. Since the penalty must be taken to have rested as much on the speech and the general invitation as on the specific one, and the former clearly were immune, the judgment cannot stand."

On the other hand, in the instant case, the state court has found that (R. 436):

> "The publications were not only reasonably calculated to accomplish that purpose but there was also a 'clear and present danger' that they would and the likelihood that such result would follow was 'extremely serious' and the degree of 'imminence extremely high.'"

It should be noted that there is no finding in the state's judgment that the publications were calculated to or did scandalize the judge.

Under the circumstances, it is submitted that under Point Four petitioners do not present a question that will sustain a writ of certiorari from the Supreme Court of the United States to the Court of Criminal Appeals of Texas.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the Court of Criminal Appeals of Texas should be denied.

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Special Attorney representing the
Attorney General of Texas.
Attorney for Respondent.

L. McCampbell

Copies of this brief have been furnished to: Messrs. Marcellus G. Eckhardt, Corpus Christi, Texas; Charles L. Black, and Ireland Graves, Austin, Texas, Attorneys for Petitioners.

Jerry D'Unger
Attorney for Respondent.

## APPENDIX

Article 5, Sec. 15 of the Constitution of Texas, is as follows:

> "There shall be established in each county in this State a County Court, which shall be a court of record; and there shall be elected in each county, by the qualified voters, a County Judge, who shall be well informed in the law of the State; shall be a conservator of the peace, and shall hold his office for two years, and until his successor shall be elected and qualified. He shall receive as a compensation for his services such fees and perquisites as may be prescribed by law."

Article 3992 of Vernon's Texas Civil Statutes, 1925, provides:

> "The judgment of the County Court finally disposing of the cause shall be conclusive of the litigation, and no further appeal shall be allowed, except where the judgment shall be for damages in an amount exceeding one hundred dollars."

Article 5154a, Section 5, Vernon's Texas Civil Statutes, is as follows:

> "All labor union organizers operating in the State of Texas shall be required to file with the Secretary of State, before soliciting any members for his organization, a written request by United States mail, or shall apply in person for an organizer's card, stating (a) his name in full; (b) his labor union affiliations, if any; (c)

describing his credentials and attaching thereto a copy thereof, which application shall be signed by him. Upon such applications being filed, the Secretary of State shall issue to the applicant a card on which shall appear the following: (1) the applicant's name; (2) his union affiliation; (3) a space for his personal signature; (4) a designation, 'labor organizer'; and, (5) the signature of the Secretary of State, dated and attested by his seal of office. Such organizer shall at all times, when soliciting members, carry such card, and shall exhibit the same when requested to do so by a person being so solicited for membership."

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 241

CONWAY C. CRAIG, BOB McCRACKEN AND TOM MULVANY,
*Petitioners,*

v.

JOHN B. HARNEY, Sheriff of Nueces County, Texas,
*Respondent*

## MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,

By ELISHA HANSON,
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729 Fifteenth Street, N. W.,
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*Of Counsel.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 241

CONWAY C. CRAIG, BOB MCCRACKEN AND TOM MULVANY,
*Petitioners,*

v.

JOHN B. HARNEY, Sheriff of Nueces County, Texas,
*Respondent*

## MOTION OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

The American Newspaper Publishers Association respectfully moves this Court for permission to file the attached brief as Amicus Curiae in the above-entitled cause.

Counsel for petitioners herein has consented to the filing of this brief. Counsel for the respondent herein has refused to grant consent.

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 700 newspaper publishers whose publications represent in

excess of eighty per cent of the total daily and Sunday circulation of newspapers published in this country.

The Association is vitally interested in the issue presented in this case, namely, the right of newspapers to publish news stories and editorials on cases pending in the courts.

Wherefore, the Association respectfully requests that this Court grant leave to file the attached brief as Amicus Curiae.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS' ASSOCIATION,

By ELISHA HANSON,
*Its Attorney,*
729 Fifteenth Street, N. W.,
Washington 5, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

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No. 241

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CONWAY C. CRAIG, BOB MCCRACKEN AND TOM MULVANY,
*Petitioners,*

v.

JOHN B. HARNEY, Sheriff of Nueces County, Texas,
*Respondent*

---

## BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

The American Newspaper Publishers Association seeks leave to file this brief as Amicus Curiae in the above entitled case in support of Petitioners' position.

### Statement of the Case.

In the interest of brevity the Amicus Curiae relies upon the statement of the case as set forth in the brief of Petitioners herein.

### Interest of the Amicus Curiae.

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday

newspapers. This membership embraces more than 700 newspaper publishers whose publications represent in excess of 80% of the total daily and Sunday circulation of newspapers published in the United States.

The Association is vitally interested in the issue presented in this case, namely, the right of newspapers to publish news stories and editorials on cases pending in the courts.

Among the functions of the daily newspaper press is the gathering and dissemination of information in the form of news and editorial comment.

News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication.

Editorial comment is discussion of such matters from the analytical or critical viewpoint. It includes expression of opinion.

The Amicus Curiae submits that the judgment of conviction for contempt here under review constitutes an abridgment of the foregoing functions of a free press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

## Constitutional Provisons Involved.

The First Amendment to the Constitution of the United States is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly and to petition the Government for a redress of grievances."

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

## Argument.

**The decision of the Court of Criminal Appeals of the State of Texas in this case is in conflict with the decisions of this Court in Bridges v. California and Pennekamp v. Florida.**

This Court, in *Bridges* v. *California*, 314 U. S. 252 (1941), established limits on the power of courts, both state and federal, to punish newspapers for comment upon pending litigation. The Court held that, under the First and Fourteenth Amendments, "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

This Court unanimously reiterated and reaffirmed that holding last term in *Pennekamp* v. *Florida*, 328 U. S. —, 90 L. ed. (Adv. Ops.) 1001, 66 S. Ct. 1029.

The Third Circuit Court of Appeals recognized the force of the *Bridges* case in *People of Virgin Islands* v. *Brodhurst*, 148 F. (2d) 636 (1945) and the Supreme Court of Louisiana followed it in *Graham* v. *Jones et al. in re Times-Picayune*, 200 La. 137, 7 So. (2d) 688 (1945). More recently, the Supreme Court of Arkansas has cited the *Bridges* and *Pennekamp* cases as binding on it in determining whether a publication constituted contempt of court. *Bates* v. *State*, —— Ark. ——, 85 Law Reporter (Ark.) 311 (1946).

The Texas Court of Criminal Appeals recognized that its decision in the present case should be controlled by this Court's decision in the *Bridges* case. The court, therefore, gave lip service to that decision by stating that the publications here were not only reasonably calculated to compel the judge to change his decision but "that there was also a 'clear and present danger' that they would and the likelihood that such result would follow was 'extremely serious' and the degree of 'imminence extremely high'." (R. 436.)

The Texas court then sought to justify this holding by stating:

> "Such conclusions are made manifest because the publications and their purpose were to impress upon Judge Browning (a) that unless he granted the motion for a new trial he would be subjected to suspicion as to his integrity and fairness and to odium and hatred in the puble (sic) mind; (b) that the safe and secure course to avoid the criticism of the press and public opinion would be to grant the motion and disqualify himself from again presiding at the trial of the case; and (c) that if he overruled the motion for a new trial, there would be produced in the public mind such a disregard for the court over which he presided as to give rise to a purpose in practice to refuse to respect and obey any order, judgment, or decree which he might render in conflict with the views of the public press." (R. 437.)

However, when the news articles and the editorial are read in the light of the *Bridges* and *Pennekamp* decisions it is clear that they did not present such a "clear and present danger" to the administration of justice as to justify the present conviction for contempt.

Under the holding of this Court in those two cases, the determination of whether the publications here actually created a "clear and present danger" to the fair and orderly administration of justice must be based on the factual situation presented in the record. And this Court has stated that:

> "In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." (*Pennekamp* v. *Florida*, 90 L. ed. (Adv. Ops.) at 1009.)

What danger to the fair and orderly administration of justice is contained in the present record? The Texas court specifically found that "No threats are involved

in the instant publications." (R. 435.) And, the court further found that "the only duty devolving upon Judge Browning at the time of the publications was to pass upon the motion for new trial." (R. 437.) The only danger to the fair and orderly administration of justice was the possibility that these publications might influence Judge Browning to grant a new trial. To assume that a judge would be so influenced by these publications would, in the words of this Court in the *Bridges* case:

> ". . . impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise." (314 U. S. at p. 273)

And, as this Court further stated in the *Pennekamp* case:

> "It is suggested, however, that even though his intellectual processes cannot be affected by a reflection on his purposes, a judge may be influenced by a desire to placate the accusing newspaper to retain public esteem and secure reelection presumably at the cost of unfair rulings against an accused. In this case too many fine-drawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary fortitude without friends or support or a powerful and vindictive newspaper bent upon a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions." (90 L. ed. (Adv. Ops.) at pp. 1010–1011.)

In the present case, the possibility that Judge Browning would have been influenced by these publications was too remote to constitute the "clear and present danger" necessary "to close the door of permissible public comment."

The Texas court relied on a statement made by Petitioner McCracken and concurred in by the other petitioners that "It was my hope that what I said would make him more careful in discharging his duty" as indicative of an intention to force Judge Browning to grant a new trial. (R. 437.) The court apparently took no notice of the fact that this was but a single sentence in the statement and

that further on Petitioner McCracken qualified this by saying:

> "As I saw it then, and as I see it now, the statements in the papers could not have the effect of overthrowing the will or undermining the conscience of the judge." (Page 59 of the Appendix of Petitioners' brief.)

Furthermore, in his testimony in the contempt proceeding, Petitioner McCracken had stated that:

> "I was striving to be fair in the discussion; I wasn't trying to influence the Court one way or the other . . ." (R. 112–113.)

The record, as a whole, does not show that Petitioners deliberately tried to influence Judge Browning in his decision.

In the light of the record, the possibility of influencing Judge Browning was too remote to constitute a "clear and present danger" to the orderly administration of justice.

## Conclusion.

Wherefore, this Amicus Curiae respectfully submits that the decision of the Texas Court of Criminal Appeals was contrary to the decisions of this Court in *Bridges* v. *California, supra*, and *Pennekamp* v. *Florida, supra*, and urges this Court to reverse the judgment of the Texas Court of Criminal Appeals in the case at bar.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, as Amicus Curiae

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# SUPREME COURT OF THE UNITED STATES

No. 241.—October Term, 1946.

| | |
|---|---|
| Conway C. Craig, Bob McCracken and Tom Mulvany, Petitioners, v. John B. Harney, Sheriff of Nueces County, Texas. | On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas. |

[May 19, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners were adjudged guilty of constructive criminal contempt by the County Court of Nueces County, Texas, and sentenced to jail for three days. They sought to challenge the legality of their confinement by applying to the Court of Criminal Appeals for a writ of *habeas corpus*.[1] That court by a divided vote denied the writ and remanded petitioners to the custody of the county sheriff. 193 S. W. 2d 178. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem and because the ruling of the Texas court raised doubts whether it conformed to the principles announced in *Bridges* v. *California*, 314 U. S. 252, and *Pennekamp* v. *Florida*, 328 U. S. 331.

Petitioners are a publisher, an editorial writer, and a news reporter of newspapers published in Corpus Christi, Texas. The County Court had before it a forcible detainer case, *Jackson* v. *Mayes*, whereby Jackson sought to regain possession from Mayes of a business building

[1] That appears to be the appropriate remedy in Texas in this type of case. *Ex parte Miller*, 91 Texas Cr. App. 607, 240 S. W. 944. As to the Texas procedure where there is an adjudication of contempt for violating an order in a civil cause, see *Thomas* v. *Collins*, 323 U. S. 516.

in Corpus Christi which Mayes (who was at the time in the armed services and whose affairs were being handled by an agent, one Burchard) claimed under a lease. That case turned on whether Mayes' lease was forfeited because of non-payment of rent. At the close of the testimony each side moved for an instructed verdict. The judge instructed the jury to return a verdict for Jackson. That was on May 26, 1945. The jury returned with a verdict for Mayes. The judge refused to accept it and again instructed the jury to return a verdict for Jackson. The jury returned a second time with a verdict for Mayes. Once more the judge refused to accept it and repeated his prior instruction. It being the evening of May 26th and the jury not having complied, the judge recessed the court until the morning of May 27th. Again the jury balked at returning the instructed verdict. But finally it complied, stating that it acted under coercion of the court and against its conscience.

On May 29th Mayes moved for a new trial. That motion was denied on June 6th. On June 4th an officer of the County Court filed with that court a complaint charging petitioners with contempt by publication. The publications referred to were an editorial and news stories published on May 26, 27, 28, 30, and 31 in the newspapers with which petitioners are connected. We have set forth the relevant parts of the publications in the appendix to this opinion. Browning, the judge, who is a layman and who holds an elective office, was criticised for taking the case from the jury. That ruling was called "arbitrary action" and a "travesty on justice." It was deplored that a layman, rather than a lawyer, sat as judge. Groups of local citizens were reported as petitioning the judge to grant Mayes a new trial and it was said that one group had labeled the judge's ruling as a "gross miscarriage of justice." It was also said that the judge's behavior had properly brought down "the wrath of public opinion upon

his head," that the people were aroused because a service man "seems to be getting a raw deal," and that there was no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated." And the fact that there could be no appeal from the judge's ruling to a court "familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel" was deplored.

The trial judge concluded that the reports and editorials were designed falsely to represent to the public the nature of the proceedings and to prejudice and influence the court in its ruling on the motion for a new trial then pending. Petitioners contended at the hearing that all that was reported did no more than to create the same impression that would have been created upon the mind of an average intelligent layman who sat through the trial. They disclaimed any purpose to impute unworthy motives to the judge or to advise him how the case should be decided or to bring the court into disrepute. The purpose was to "quicken the conscience of the judge" and to "make him more careful in discharging his duty."

The Court of Criminal Appeals, in denying the writ of *habeas corpus*, stated that the "issue before us" is "whether the publications . . . were reasonably calculated to interfere with the due administration of justice" in the pending case. 193 S. W. 2d p. 186. It held that "there is no escape from the conclusion that it was the purpose and intent of the publishers . . . to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision on conduct of the case. According to their viewpoint, Judge Browning was wrong and they took it upon themselves to make him change his decision." *Id.*, pp. 188–189. The court went on to say that "It is hard to conceive how the public press could have been more forcibly or sub-

stantially used or applied to make, force, and compel a judge to change a ruling or decision in a case pending before him than was here done." *Id.*, p. 189. The court distinguished the *Bridges* case, noting that there the published statements carried threats of future adverse criticism and action on the part of the publisher if the pending matter was not disposed of in accordance with the views of the publisher, that the views of the publisher in the matter were already well-known, and that the *Bridges* case was not private litigation but a suit in the outcome of which the public had an interest. *Id.*, p. 188. It concluded that the facts of this case satisfied the "clear and present danger" rule of the *Bridges* case. That test was, in the view of the court, satisfied "because the publications and their purpose were to impress upon Judge Browning (a) that unless he granted the motion for a new trial he would be subjected to suspicion as to his integrity and fairness and to odium and hatred in the public mind; (b) that the safe and secure course to avoid the criticism of the press and public opinion would be to grant the motion and disqualify himself from again presiding at the trial of the case; and (c) that if he overruled the motion for a new trial, there would be produced in the public mind such a disregard for the court over which he presided as to give rise to a purpose in practice to refuse to respect and obey any order, judgment, or decree which he might render in conflict with the views of the public press." *Id.*, p. 189.

The court's statement of the issue before it and the reasons it gave for holding that the "clear and present danger" test was satisfied have a striking resemblance to the findings which the Court in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, held adequate to sustain an adjudication of contempt by publication.[2] That case held

[2] The findings which the Court in that case sustained were as follows:

"(a) Because . . . their manifest purpose was to create the impression on the mind of the court that it could not decide in the

that comment on a pending case in a federal court was punishable by contempt if it had a "reasonable tendency" to obstruct the administration of justice. We revisited that case in *Nye* v. *United States*, 313 U. S. 33, 52, and disapproved it. And in *Bridges* v. *California*, *supra*, we held that the compulsion of the First Amendment, made applicable to the States by the Fourteenth (*Schneider* v. *Irvington*, 308 U. S. 147; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108)-forbade the punishment by contempt for comment on pending cases in absence of a showing that the utterances created a "clear and present danger" to the administration of justice. 314 U. S. pp. 260–264. We reaffirmed and reapplied that standard in *Pennekamp* v. *Florida*, *supra*, which also involved comment on matters pending before the court. We stated, p. 347:

> "Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Free-

matter before it in any but the one way without giving rise to such a state of suspicion as to the integrity or fairness of its purpose and motives as might engender a shrinking from so doing. (b) Because the publications directly tended to incite to such a condition of the public mind as would leave no room for doubt that if the court, acting according to its convictions, awarded relief, it would be subject to such odium and hatred as to restrain it from doing so. (c) Because the publications also obviously were intended to produce the impression that any order which might be rendered by the court in the discharge of its duty, if not in accord with the conceptions which the publications were sustaining, would be disregarded and cause a shrinking from performing duty to avoid the turmoil and violence which the publications, it may be only by covert insinuation, but none the less assuredly, invited. And (d) because the publications were of a character, not merely because of their intemperance but because of their general tendency, to produce in the popular mind a condition which would give rise to a purpose in practice to refuse to respect any order which the court might render if it conflicted with the supposed rights of the city espoused by the publications."

247 U. S. pp. 414–415.

dom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."

Neither those cases nor the present one raises questions concerning the full reach of the power of the state to protect the administration of justice by its courts. The problem presented is only a narrow, albeit important, phase of that problem—the power of a court promptly and without a jury trial to punish for comment on cases pending before it and awaiting disposition. The history of the power to punish for contempt (see *Nye* v. *United States, supra; Bridges* v. *California, supra*) and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice.

In a case where it is asserted that a person has been deprived by a State court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made. See *Norris* v. *Alabama*, 294 U. S. 587, 590; *Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Chambers* v. *Florida*, 309 U. S. 227, 228–229; *Lisenba* v. *California*, 314 U. S. 219, 237–238; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 147–148. This is such a case.

We start with the news articles. A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite

of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

The articles of May 26, 27, and 28 were partial reports of what transpired at the trial. They did not reflect good reporting, for they failed to reveal the precise issue before the judge. They said that Mayes, the tenant, had tendered a rental check. They did not disclose that the rental check was post-dated and hence, in the opinion of the judge, not a valid tender. In that sense the news articles were by any standard an unfair report of what transpired.[3] But inaccuracies in reporting are commonplace. Certainly a reporter could not be laid by the heels for contempt because he missed the essential point in a trial or failed to summarize the issues to accord with the views of the judge who sat on the case. Conceivably, a plan of reporting on a case could be so designed and executed as to poison the public mind, to cause a march on the court house, or otherwise so disturb the delicate balance in a highly wrought situation as to imperil the fair and orderly functioning of the judicial process. But it takes more imagination than we possess to find in

[3] The charge against petitioners also set forth other allegedly false statements: (1) that Mayes was not an ex-insurance man but in the insurance business at the time; (2) that terms of the contract on which Jackson sued were not disclosed; (3) that the arrangements under which the premises had been operated for some months before Mayes was inducted into the armed services were not disclosed; (4) that the articles failed to state the legal grounds on which Jackson's motion for an instructed verdict was argued and granted; (5) that much material evidence was omitted which would have enabled the public to form a fair estimate of the nature of the controversy; (6) that the principal plaintiffs who were highly respected business and professional men of Corpus Christi were not named.

These omissions, though reflecting on the quality of the reporting, do not seem to us to be of importance here.

this rather sketchy and one-sided report of a case any imminent or serious threat to a judge of reasonable fortitude. See *Pennekamp* v. *Florida*, *supra*.

The accounts of May 30 and 31 dealt with the news of what certain groups of citizens proposed to do about the judge's ruling in the case. So far as we are advised, it was a fact that they planned to take the proposed action. The episodes were community events of legitimate interest. Whatever might be the responsibility of the group which took the action, those who reported it stand in a different position. Even if the former were guilty of contempt, freedom of the press may not be denied a newspaper which brings their conduct to the public eye.

The only substantial question raised pertains to the editorial. It called the judge's refusal to hear both sides "high handed," a "travesty on justice," and the reason that public opinion was "outraged." It said that his ruling properly "brought down the wrath of public opinion upon his head" since a service man "seems to be getting a raw deal." The fact that there was no appeal from his decision to a "judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly" was a "tragedy." It deplored the fact that the judge was a "layman" and not a "competent attorney." It concluded that the "first rule of justice" was to give both sides an opportunity to be heard and when that rule was "repudiated," there was "no way of knowing whether justice was done."

This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him. . . ." See *Craig* v. *Hecht*, 263 U. S. 255, 281, Mr. Justice Holmes dissenting. The vehemence of the language used is not alone the measure of the power to punish for contempt.

The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.

We agree with the court below that the editorial must be appraised in the setting of the news articles which both preceded and followed it. It must also be appraised in light of the community environment which prevailed at that time. The fact that the jury was recalcitrant and balked, the fact that it acted under coercion and contrary to its conscience and said so were some index of popular opinion. A judge who is part of such a dramatic episode can hardly help but know that his decision is apt to be unpopular. But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. Conceivably a campaign could be so managed and so aimed at the sensibilities of a particular judge and the matter pending before him as to cross the forbidden line. But the episodes we have here do not fall in that category. Nor can we assume that the trial judge was not a man of fortitude.

The editorial's complaint was two-fold. One objection or criticism was that a layman rather than a lawyer sat on the bench. That is legitimate comment; and its relevancy could hardly be denied at least where judges are elected. In the circumstances of the present case, it amounts at the very most to an intimation that come the next election the newspaper in question will not support the incumbent. But it contained no threat to oppose him in the campaign if the decision on the merits was not overruled, nor any implied reward if it was changed. Judges who stand for reelection run on their records. That may be a rugged environment. Criticism is expected. Discussion of their conduct is appropriate, if not necessary. The fact that

the discussion at this particular point of time was not in good taste falls far short of meeting the clear and present danger test.

The other complaint of the editorial was directed at the court's procedure—its failure to hear both sides before the case was decided. There was no attempt to pass on the merits of the case. The editorial, indeed, stated that there was no way of knowing whether justice was done. That criticism of the court's procedure—that it decided the case without giving both sides a chance to be heard—reduces the salient point of the case to a narrow issue. If the point had been made in a petition for rehearing, and reduced to lawyer's language, it would be of trifling consequence. The fact that it was put in layman's language, colorfully phrased for popular consumption, and printed in a newspaper does not seem to us to elevate it to the criminal level. It might well have a tendency to lower the standing of the judge in the public eye. But it is hard to see on these facts how it could obstruct the course of justice in the case before the court. The only demand was for a hearing. There was no demand that the judge reverse his position—or else.

"Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges* v. *California*, *supra*, p. 271. But there was here no threat or menace to the integrity of the trial. The editorial challenged the propriety of the court's procedure, not the merits of its ruling. Any such challenge, whether made prior or subsequent to the final disposition of a case, would likely reflect on the competence of the judge in handling cases. But as we have said, the power to punish for contempt depends on a more substantial showing. Giving the editorial all of the vehemence which the court below found in it we fail to see how it could in any realistic sense create an imminent and serious threat to the ability of the court to give fair consideration to the motion for rehearing.

There is a suggestion that the case is different from *Bridges* v. *California*, *supra*, in that we have here only private litigation, while in the *Bridges* case labor controversies were involved, some of them being criminal cases. The thought apparently is that the range of permissible comment is greater where the pending case generates a public concern. The nature of the case may, of course, be relevant in determining whether the clear and present danger test is satisfied. But, the rule of the *Bridges* and *Pennekamp* cases is fashioned to serve the needs of all litigation, not merely select types of pending cases.

*Reversed.*

## APPENDIX.

On May 26, 1945, a *news item* stated:

> "Burchard further claimed that although he had not known of the option clause, when he learned of it he had immediately proffered a check for $275 rental."

On May 27, 1945, there was a *news item* which stated:

> "At 7 p. m., Browning, without listening to argument from counsel for either side on a plaintiff's motion, presented by Dudley Tarlton for Jackson, and without giving the six-man jury opportunity to weigh the evidence, instructed the jury to find against Mayes.
>
> "Walter M. Lewright, Mayes' attorney, protested that the court's arbitrary action had ruled that Tarlton's 'one-page motion' did not need supporting argument and citation of authorities."

On May 28, 1945, an *article* said:

> "Browning accepted Tarlton's one-page motion and, without permitting argument or citation of authorities to support the motion, ruled that it be granted. The effect of this ruling was that Browning took the matter from the jury."

That article also included the following statement made by Mayes' attorney to the jury on May 27, 1945:

> "However, I now advise you that under the law, Judge Browning has the right to compel you, even against the dictates of your conscience, to sign the verdict he has ordered.
>
> "As a matter of fact, it is probable that he has the power to put you in jail until such time as you do sign it, and I rather imagine, from what has heretofore taken place in this trial, that unless you do sign the verdict, he will cause you to be put in jail.
>
> "As I and my clients feel that you have done all in your power to register your protest and revulsion of feeling at the effect of this decision reached by Judge Browning; as you are helpless to do anything further; and as making you suffer by remaining locked up will

not do us a bit of good, I suggest that you sign the verdict and return to your homes with a clear conscience of having done all that you could to protect the rights of a man whom I feel, and evidently you feel, has been done a gross injustice.

"While we have no appeal from the court's decision in this case, we do have the right again to appeal to his conscience by presenting a motion for new trial in this action—and which motion we will file and argue strenuously with the hope that in the meantime, he will see the error committed and will rectify the same.

"There cannot be any doubt but that the action of you men in registering your protest against this decision, as you have done, will affect him. At least I can only hope that it will. I sincerely thank you."

On May 30, 1945, an *editorial* stated:

"Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on, especially when a man in the service of his country seems to be getting a raw deal . . . Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a chance to argue against it.

"That was the travesty on justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's no wonder that the jury balked and public opinion is outraged.

"The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as judge in a case where fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances a competent lay-

man would be better qualified, but the county judge's office is an exception. He should be a competent attorney as well as a competent businessman.

"It's the tragedy in a case of this sort that the court where the controversial decision was handed down is the court of last resort. It's too bad that appeal can't be made to a district court and heard by a judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly . . . There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated."

On May 30, 1945, there appeared a *report* of a resolution passed by the Sailor's and Soldier's Advisory Council of Corpus Christi "labeling County Judge Joe D. Browning's order for a directed verdict against Mayes a 'gross miscarriage of justice.'" That *article* further stated:

"The council's resolution called on Browning to grant Mayes a new trial on the grounds that he had committed an error in instructing the jury to find for the plaintiff. The petition asked that Browning, upon granting the new trial, should disqualify himself to further sit as judge in the trial, and should permit the trial to be retried before another judge and jury . . . The trial reached a climax Saturday night when Browning, on motion of Dudley Tarlton Jackson's counsel, and without argument or citation of authority, instructed the six-man County Court jury to find for Jackson. The jury twice refused, both times bringing in verdicts in favor of Mayes and against Jackson.

"Browning had the jury confined to the courthouse jury room all Saturday night. Sunday morning, when the court convened, the jury reported that it still had not signed the verdict in favor of Jackson.

"Browning announced that he would lock the jury up again until Monday morning. However, Walter M. Lewright advised the jurymen that they should not continue to 'suffer' any longer and should sign the

verdict since Browning had the legal right to force them to do so. The jury signed the verdict but appended a statement asserting that they did so under pressure."

On May 31, 1945, a *news story* said:

"Three local groups were reported last night to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy Cafe ouster suit.

"One petition is reported being drawn by a parents and teachers' group, another by a service mothers' group, and the third is being drawn for independent circulation among parents of men in service.

"The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi Soldier's and Sailor's Advisory Council Tuesday night. This petition called on Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under another judge and jury. Action on the petitions is expected shortly.

"The council's petition, drawn up by five veterans' organizations with a membership of more than 1,000, followed by a few hours the filing of a motion for a new trial by Walter M. Lewright and LeGrand Woods, Mayes' counsels . . . It came to a climax Sunday when Browning Saturday night accepted without argument or citation of authority a motion by Dudley Tarlton Jackson's lawyer, for an instructed verdict . . . . The jury was kept Saturday night in the Court House. Sunday morning, following a threat by Browning to keep the jury together until they did sign, the jurymen signed the verdict, appending a statement that they did so against the dictates of their conscience."

# SUPREME COURT OF THE UNITED STATES

No. 241.—October Term, 1946.

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|---|---|
| Conway C. Craig, Bob McCracken and Tom Mulvany, Petitioners, v. John B. Harney, Sheriff of Nueces County, Texas. | On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas. |

[May 19, 1947.]

Mr. Justice Murphy, concurring.

While joining in the opinion of the Court, I believe that the importance of the problem raised by this case cannot be overemphasized. A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty. Any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to print and to read the truth.

In my view, the Constitution forbids a judge from summarily punishing a newspaper editor for printing an unjust attack upon him or his method of dispensing justice. The only possible exception is in the rare instance where the attack might reasonably cause a real impediment to the administration of justice. Unscrupulous and vindictive criticism of the judiciary is regrettable. But judges must not retaliate by a summary suppression of such criticism for they are bound by the command of the First Amendment. Any summary suppression of unjust criticism carries with it an ominous threat of summary suppression of all criticism. It is to avoid that threat that the First Amendment, as I view it, outlaws the summary contempt method of suppression.

Silence and a steady devotion to duty are the best answers to irresponsible criticism; and those judges who

feel the need for giving a more visible demonstration of their feelings may take advantage of various laws passed for that purpose which do not impinge upon a free press. The liberties guaranteed by the First Amendment, however, are too highly prized to be subjected to the hazards of summary contempt procedure.

# SUPREME COURT OF THE UNITED STATES

No. 241.—October Term, 1946.

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| Conway C. Craig, Bob McCracken and Tom Mulvany, Petitioners,<br>*v.*<br>John B. Harney, Sheriff of Nueces County, Texas. | On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas. |

[May 19, 1947.]

Mr. Justice Frankfurter, with whom The Chief Justice concurs, dissenting.

Today's decision, in effect though not in terms, holds unconstitutional a power the possession of which by the States this Court has heretofore deemed axiomatic.

It cannot be repeated too often that the freedom of the press so indispensable to our democratic society presupposes an independent judiciary which will, when occasion demands, protect that freedom. To help achieve such an independent judiciary and to protect its members in their independence, the States of the Union, from the very beginning and throughout our history, have provided for prompt suppression and punishment of interference with the impartial exercise of the judicial process in an active litigation. Interference was punished not by the ordinary criminal process of trial before a jury, but through a distinctive proceeding, summary in character in the sense that a judge without a jury might impose punishment. Such protective measures against publications seriously calculated to agitate the disinterested operation of the judicial process in a litigation awaiting disposition have been deemed part of the constitutional authority of the States to establish courts to do justice as between man and man and between man and society.

The opinion of the Court reviews the Texas Court as though we were merely reviewing the judgment of a court lower in the judiciary hierarchy. Formally, no doubt, we have before us the correctness of a decision of the Court of Criminal Appeals of Texas. But that decision is challenged as offending the Due Process Clause of the Fourteenth Amendment. We are not, therefore, merely reviewing a decision of the Texas Court; we are passing upon the power of the State of Texas. "The question before us must be considered in the light of the total power the State possesses . . ." *Skiriotes* v. *Florida*, 313 U. S. 69, 79. To paraphrase what was said in *Rippey* v. *Texas*, 193 U. S. 504, 509, the question for us is this: if Texas had expressly provided in its Constitution that publications in the circumstances here found by the Texas Court shall constitute contempt of court, would this Court hold that such finding by the Texas Court and such a provision in the Texas Constitution collide with the Constitution of the United States?

Texas, speaking through its authoritative judicial voice, says: "When the several publications in the instant case are considered together and in their chronological order of appearance, there is no escape from the conclusion that it was the purpose and intent of the publishers thereof to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint, Judge Browning was wrong and they took it upon themselves to make him change his decision." — Tex. —, 193 S. W. 2d 178, 188–89.

After a painstaking examination of the series of publications in the setting of the circumstances of the case, and an extended hearing, all of which comprises a record here of more than four hundred pages, the Court below reached

this conclusion: "It is hard to conceive how the public press could have been more forcibly or substantially used or applied to make, force, and compel a judge to change a ruling or decision in a case pending before him than was here done. The publications were not only reasonably calculated to accomplish that purpose but there was also a 'clear and present danger' that they would and the likelihood that such result would follow was 'extremely serious' and the degree of 'imminence extremely high.'" — Tex. —, 193 S. W. 2d at 189. It must be emphasized that the publications in question were made after it was notorious that a motion for a new trial had already been made and would shortly be heard. In the light of this crucial fact—that the trial judge would shortly be called upon to reconsider his instruction to the jury to find for the plaintiff—the court below found that

> "the publications and their purpose were to impress upon Judge Browning (a) that unless he granted the motion for a new trial he would be subjected to suspicion as to his integrity and fairness and to odium and hatred in the public mind; (b) that the safe and secure course to avoid the criticism of the press and public opinion would be to grant the motion and disqualify himself from again presiding at the trial of the case; and (c) that if he overruled the motion for a new trial, there would be produced in the public mind such a disregard for the court over which he presided as to give rise to a purpose in practice to refuse to respect and obey any order, judgment, or decree which he might render in conflict with the views of the public press." — Tex. —, 193 S. W. 2d at 189.

The Court minimizes these findings by pointing to a likeness between them and those that were made in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, and found

inadequate by Mr. Justice Holmes' dissent, an inadequacy subsequently supported by our decision in *Nye* v. *United States*, 313 U. S. 33. The Court also draws on *Craig* v. *Hecht*, 263 U. S. 255, as though what was said there applies here. But those three cases involved only the construction of the federal statute. Congress decided to allow the power to punish for contempt theretofore vested in the lower federal courts, when invoked against misbehavior not in the presence of the court, only when such misbehavior was "so near" the presence of the court "as to obstruct the administration of justice." Act of March 2, 1831, 4 Stat. 487; § 268 of the Judicial Code, 28 U. S. C. § 385; *Nye* v. *United States, supra.* Texas, however, has seen fit not to restrict the power of its courts to punish for contempt as does the federal statute. The power to punish for contempt which the Texas legislature granted to its courts more than a hundred years ago is not restricted as Congress restricted the contempt power of the lower federal courts. See Acts 1846, p. 200; Vernon's Texas Statutes, Art. 1955. It is an inadmissible jump from finding that conduct is not contempt within the federal Act, to finding that an exertion of State power offended the Fourteenth Amendment. Yet the Court now finds that Texas has transgressed the implications of the Due Process Clause by punishing conduct which this Court in the *Toledo* case thought was within the scope even of the federal Act—a construction which it occurred to no member of the Court to question on constitutional grounds.

The difference between the issue before us and that raised by the *Toledo* and *Craig* cases is basic. In those cases the Court had before it, and Mr. Justice Holmes was concerned only with, the proper application of a federal statute setting a narrowly confined scope to the power to punish for contempt. The Court was not concerned with

the Constitutional power of the States to enforce a broader contempt policy. Such a power, in fact, had been assumed to be beyond doubt. "When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." So wrote Mr. Justice Holmes for this Court. *Patterson* v. *Colorado*, 205 U. S. 454, 463. To be sure, he wrote this forty years ago, and on several occasions thereafter, as part of the formulation of his profound tolerance for freedom of expression, he spoke out against misuse of the power to punish for contempt. But nothing that that great judge ever wrote qualified in the slightest his conviction that the theory of our system of justice is "that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson* v. *Colorado, supra*, at 462. Mr. Justice Holmes had no tolerance whatever for any special claim by judges to immunity from criticism. He was against anything that smacked of summary proceeding for what was known as "scandalizing the court," that is, speaking ill of a court as an institution and thereby argumentatively bringing it into disrepute. He would allow summary punishment of conduct calculated to affect a judge in the discharge of his duty only as to matters "pending" before him in the active sense of that term. "It is not enough that somebody may hereafter move to have something done." So he wrote, dissenting, in *Craig* v. *Hecht, supra*, at 281. And in his misapplied dissent in the *Toledo* case he expressed his impatience with federal judges who take notice of newspaper comments to which a judge should be indifferent. But his opinion in that case conveys not a doubt as to the power of States to enforce a policy

for the punishment of contempt in relation to a pending case, though the State policy be not limited as Congress limited the power of the federal courts to punish for contempt. There is not a breath of a suggestion in the opinion in the *Nye* case that the restricted geographic meaning which the Court gave to the Act of Congress designed to limit the power of the lower federal courts was required by constitutional considerations. The opinions of Mr. Justice Holmes contain not the remotest hint that the Due Process Clause withdrew from the States the power to base a finding of contempt on publication aimed at a particular outcome of a matter awaiting adjudication. And it is worthy of note that in the very opinion in which the phrase "clear and present danger" was first used by Mr. Justice Holmes, he referred to his opinion in the *Patterson* case, and not with disapproval. See *Schenck* v. *United States*, 279 U. S. 47, 51–52.

We are not dealing here with criticisms, whether temperate or unbridled, of action in a case after a judge is through with it, or of his judicial qualifications, or of his conduct in general. Comment on what a judge has done—criticism of the judicial process in a particular case after it has exhausted itself—no matter how ill-informed or irresponsible or misrepresentative, is part of the precious right of the free play of opinion. Whatever violence there may be to truth in such utterances must be left to the correction of truth.

The publications now in question did not constitute merely a narrative of a judge's conduct in a particular case nor a general commentary upon his competence or his philosophy. Nor were they a plea for reform of the Texas legal system to the end that county court judges should be learned in the law and that a judgment in a suit of forcible detainer may be appealable. The thrust of the articles was directed to what the judge should do

on a matter immediately before him, namely to grant a motion for a new trial. So the Texas Court found. And it found this not in the abstract but on the particular stage of the happenings and on the circumstances disclosed by the record. The Texas Court made its findings with reference to the locality where the events took place and in circumstances which may easily impart significance to the Texas Court but may elude full appreciation here.

Corpus Christi, the locale of the drama, had a population of less than 60,000 at the last census, and Nueces County about 92,000. The three papers which published the articles complained of are under common control and are the only papers of general circulation in the area. It can hardly be a compelling presumption that such papers so controlled had no influence, at a time when patriotic fervor was running high, in stirring up sentiment of powerful groups in a small community in favor of a veteran to whom, it was charged, a great wrong had been done. It would seem a natural inference, as the court below in effect found, that these newspapers whipped up public opinion against the judge to secure reversal of his action and then professed merely to report public opinion. We cannot say that the Texas Court could not properly find that these newspapers asked of the judge, and instigated powerful sections of the community to ask of the judge, that which no one has any business to ask of a judge, except the parties and their counsel in open court, namely, that he should decide one way rather than another. Only if we can say that the Texas Court had no basis in reason to find what it did find, can we deny that the purpose of the articles in their setting was to induce the judge to grant a new trial. Surely a jury could reach such a conclusion on these facts. We ought not to allow less leeway to the Texas Court in drawing inferences than we would to a jury. Because it is a question of degree, the field

in which a court, like a jury, may "exercise its judgment is, necessarily, a wide one." Mr. Justice Brandeis in *Schaefer* v. *United States*, 251 U. S. 466, 483. Of course, the findings by a State court of what are usually deemed facts cannot foreclose our scrutiny of them if a constitutional right depends on a fair appraisal of those facts. But it would be novel doctrine indeed to say that we may consider the record as it comes before us from a State court as though it were our duty or right to ascertain the facts in the first instance. A State cannot by torturing facts preclude us from considering whether it has thereby denied a constitutional right. Neither can this Court find a violation of a constitutional right by denying to a State its right to a fair appraisal of facts and circumstances peculiarly its concern. Otherwise, in every case coming here from a State court this Court might make independent examination of the facts, because every right claimed under the Constitution is a fundamental right. The "most respectful attention" which we have been told is due to a State would then be merely an empty profession. See *Pennekamp* v. *Florida*, 328 U. S. 331, 335.

If under all the circumstances the Texas Court here was not justified in finding that these publications created "a clear and present danger" of the substantive evil that Texas had a right to prevent, namely the purposeful exertion of extraneous influence in having the motion for a new trial granted, "clear and present danger" becomes merely a phrase for covering up a novel, iron constitutional doctrine. Hereafter the States cannot deal with direct attempts to influence the disposition of a pending controversy by a summary proceeding, except when the misbehavior physically prevents proceedings from going on in court or occurs in its immediate proximity. Only the pungent pen of Mr. Justice Holmes could

adequately comment on such a perversion of the purpose of his phrase.

Changes are rung on the remark of Mr. Justice Holmes in the *Toledo* case that "a judge of the United States is expected to be a man of ordinary firmness of character." 247 U. S. at 424. But it is pertinent to observe that that was said by an Olympian who was so remote from the common currents of life that he did not read newspapers. Even a conscientious judge not a layman, and not merely one serving under a short judicial tenure, may find himself in a dilemma when subjected to a barrage pressing a particular result in a case immediately before him. He may not unnaturally be moved to do what is urged, or he may be impelled to display his independence and not give to the arguments on behalf of the motion for a new trial that serene and undisturbed consideration which often leads judges to grant such a motion. It has not been unknown that judges persist in error to avoid giving the appearance of weakness and vacillation. Thus, one or another of the litigants before the Court may have been denied that disinterested exercise of judgment which is of the essence of the judicial process. The demands found to have been made upon the judge by these papers may agitate even a conscientious judge. He may himself be unaware of the extent to which his powers of reason have not the sway they would otherwise have. Or a judge, proud of his independence, may unconsciously have his back stiffened, and thereby his mind, when hearing the motion for a new trial and passing on its validity. Judges are not merely the habitations of bloodless categories of the law which pursue their predestined ends.

The fact that it cannot be demonstrated how the delicate balance of an adjudication was tampered with, or whether it was, does not prove that it was not tampered with. To rely on the assumption that judges are men of

fortitude and that no judge "worthy of the name" would be influenced in his decision by a publication directed toward a particular disposition of a pending litigation, is to say in effect that the Due Process Clause precludes a State from believing that there may be such a psychological danger, short of the fantastic situation where a judge confesses that he decided as he did because of newspaper pressure, or avows that he came awfully close to being derelict in his judicial duty because of such pressure. In *Bridges* v. *United States*, 314 U. S. 252, this Court did not profess to make a constitutional dogma of so questionable a psychological assumption. It did not condemn outright the power of a State summarily to punish for contempt a publication uttered outside of court but brought to bear upon a pending case. The opinion of the Texas Court gives every indication of scrupulous obedience to the requirements of the *Bridges* case. Nor did the dissenting judge find conflict with the *Bridges* case. If we accord "most respectful attention" to what the State court has decided, I am unable to find any ground for rejecting the application which the Texas Court made to the circumstances of this case of the principles which it drew from the *Bridges* case.

Is it conceivable that even the most doctrinaire libertarian would think it consonant with the impartiality which adjudication presupposes to publish a poll regarding the outcome desired by a community in a pending case? How can the insertion into the scales of justice of a newspaper's own notion of the desire of a community for a particular result in a pending case be more permissible than the report of public feeling as ascertained by a public poll? Again, suppose the newspaper articles here in controversy had been enclosed in a letter to the judge urging, on the basis of these articles, a new trial. Would the Constitution of the United States forbid a State to deal

with such conduct through the corrective process of contempt? But a denial of this power to the States where newspapers carry the same articles directed to the same end can only be on the basis that private correspondence has less constitutional protection than have newspapers.

To agree with a principle in principle only to depart from it in practice has not been so fruitful of good in the world of diplomacy as to suggest its importation into the judicial process. If it be deemed that the Due Process Clause put an end to the historic power of States to allow summary proceedings for contempt by interference with an actually pending controversy, or even if it be deemed offensive to due process for the judge whose conduct is called in question to sit in judgment upon the contemnor because self-interest is too great, see *Tumey* v. *Ohio*, 273 U. S. 510, and *Cooke* v. *United States*, 267 U. S. 517, 539, such a break with the past had best be completely candid. It may well be the deeper wisdom to treat with intelligent neglect paragraphs that are calculated and intended to influence the disposition of litigation. But the wisdom of such wisdom is not the measure of the constitutional power of the several States to deal with extraneous influence designed to affect the outcome of a particular case.

We think the judgment should be affirmed.

# SUPREME COURT OF THE UNITED STATES

No. 241.—October Term, 1946.

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| Conway C. Craig, Bob McCracken and Tom Mulvany, Petitioners, v. John B. Harney, Sheriff of Nueces County, Texas. | On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas. |

[May 19, 1947.]

Mr. Justice Jackson, dissenting.

This is one of those cases in which the reasons we give for our decision are more important to the development of the law than the decision itself.

It seems to me that the Court is assigning two untenable, if not harmful reasons for its action. The first is that this newspaper publisher has done no wrong. I take it that we could not deny the right of the state to punish him if he had done wrong and I do not suppose we could say that the traditional remedy was an unconstitutional one.

The right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit. I think this publisher passed beyond the legitimate use of press freedom and infringed the citizen's right to a calm and impartial trial. I do not think we can say that it is beyond the power of the state to exert safeguards against such interference with the course of trial as we have here.

This was a private lawsuit between individuals. It involved an issue of no greater public importance than which of two claimants should be the tenant of the "Playboy Cafe." The public interest in the litigation

was that dispassionate justice be done by the court and that it appear to be done.

The publisher had a complete monopoly of newspaper publicity in that locality. For reasons that are not apparent, the papers took an unusual interest in the proceeding. They first made what the court agrees was a "rather sketchy and one-sided report of a case." This is not overstatement. The former tenant had tendered a check and the newspaper report represented it as a payment of rent; it made no reference to the fact that the check was postdated and was therefore no payment at all. Reports played up the fact that its favorite among the litigants was a veteran. The community became aroused. Then the newspaper published editorials which attacked the judge while a motion for retrial was pending with what the prevailing opinion concedes was "strong language, intemperate language, and, we assume, an unfair criticism." The object of the publicity appears to have been to get the judge to reverse himself and to grant a new trial.

The fact that he did not yield to it does not prove that the attack was not an effective interference with the administration of justice. The judge was put in a position in which he either must appear to yield his judgment to public clamor or to defy public sentiment. The consequence of attacks may differ with the temperament of the judge. Some judges may take fright and yield while others become more set in their course if only to make clear that they will not be bullied. This judge was evidently of the latter type. He was diverted from the calm consideration of the litigation before him by what he regarded as a duty to institute a contempt proceeding of his own against his tormentors.

For this Court to imply that this kind of attack during a pending case is all right seems to me to compound the wrong. The press of the country may rightfully take the decision of this Court to mean indifference toward, if not

approval of, such attacks upon courts during pending cases. I think this opinion conveys a wrong impression of the responsibilities of a free press for the calm and dispassionate administration of justice and that we should not hesitate to condemn what has been done here.

But even worse is that this Court appears to sponsor the myth that judges are not as other men are, and that therefore newspaper attacks on them are negligible because they do not penetrate the judicial armor. Says the opinion: "But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." With due respect to those who think otherwise, to me this is an ill-founded opinion, and to inform the press that it may be irresponsible in attacking judges because they have so much fortitude is ill-advised, or worse. I do not know whether it is the view of the Court that a judge must be thick-skinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity. Who does not prefer good to ill report of his work? And if fame—a good public name—is, as Milton said, the "last infirmity of noble mind," it is frequently the first infirmity of a mediocre one.

From our sheltered position, fortified by life tenure and other defenses to judicial independence, it is easy to say that this local judge ought to have shown more fortitude in the face of criticism. But he had no such protection. He was an elective judge, who held for a short term. I do not take it that an ambition of a judge to remain a judge is either unusual or dishonorable. Moreover, he was not a lawyer, and I regard this as a matter of some consequence. A lawyer may gain courage to render a decision that temporarily is unpopular because he has confidence that his profession over the years will approve it, despite its unpopular reception, as has

been the case with many great decisions. But this judge had no anchor in professional opinion. Of course, the blasts of these little papers in this small community do not jolt us, but I am not so confident that we would be indifferent if a news monopoly in our entire jurisdiction should perpetrate this kind of an attack on us.

It is doubtful if the press itself regards judges as so insulated from public opinion. In this very case the American Newspaper Publishers Association filed a brief *amicus curiae* on the merits after we granted certiorari. Of course, it does not cite a single authority that was not available to counsel for the publisher involved, and does not tell us a single new fact except this one: "This membership embraces more than 700 newspaper publishers whose publications represent in excess of eighty per cent of the total daily and Sunday circulation of newspapers published in this country. The Association is vitally interested in the issue presented in this case, namely, the right of newspapers to publish news stories and editorials on cases pending in the courts."

This might be a good occasion to demonstrate the fortitude of the judiciary.